Supreme Court, U.S.
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No. 03 169 JUL 31 2003

In The
Supreme Court of the United States

MIKE MULLIN, Warden,
Oklahoma State Penitentiary,

Petitioner,

v.

CYRIL WAYNE ELLIS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Should a state court determination that explains its decision but fails to cite federal law be entitled to no deference and, therefore, be given de novo review by a federal habeas court; whereas, a state court determination that lacks any explanation at all be entitled to deference under 28 U.S.C. § 2254(d)(1)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
A. Proceedings in the State Courts	5
B. Proceedings in the District Court	7
C. Proceedings in the Tenth Circuit	9
REASONS FOR GRANTING THE WRIT	11
A. The decision of the Tenth Circuit directly conflicts with this Court's decision in *Early v. Packer*, inappropriately disregards the deference provisions mandated by the Antiterrorism and Effective Death Penalty Act of 1996, and improperly expands federal habeas corpus jurisdiction	12
B. Subsequent to denying Petitioner's request for rehearing, the Tenth Circuit acknowledged that it erred in conducting de novo review of Respondent's *Chambers* claim; therefore, certiorari review by this Court is Petitioner's only redress for correcting the Tenth Circuit's professed error and the blatant injustice that has occurred in this matter	22
CONCLUSION	26

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion of the United States Court of Appeals for the Tenth Circuit filed December 10, 2002 ..... App. 1

Memorandum Opinion and Order of the United States District Court for the Western District of Oklahoma filed November 27, 2000 ..... App. 24

Opinion of the Oklahoma Court of Criminal Appeals filed July 24, 1992 ..... App. 131

Opinion on Rehearing from the Oklahoma Court of Criminal Appeals filed January 26, 1994 ..... App. 161

Order Denying Petition for Rehearing from the United States Court of Appeals for the Tenth Circuit filed on March 4, 2003 ..... App. 171

Discharge Summary from Eastern State Hospital ..... App. 173

TABLE OF AUTHORITIES

Page

CASES

Aycox v. Lytle, 196 F.3d 1174 (10th Cir. 1999) 24
Bell v. Cone, 535 U.S. 685 (2002).....21
Chambers v. Mississippi, 410 U.S. 284 (1973) .....*passim*
Cook v. McKune, 323 F.3d 825 (10th Cir. 2003).....5, 23
Crane v. Kentucky, 476 U.S. 683 (1986) 17, 18
Delaware v. Van Arsdall, 475 U.S. 673 (1986) 17
Early v. Packer, 537 U.S. 3 (2002).....*passim*
Ellis v. Mullin, 312 F.3d 1201 (10th Cir. 2002) 23
Ellis v. State, 867 P.2d 1289 (Okla.Crim.App.1992).....8, 9, 10
Le v. Mullin, 311 F.3d 1002 (10th Cir. 2002) 10
Miller v. State, 751 P.2d 733 (Okla.Crim.App.1998) 6, 8, 16
Montana v. Egelhoff, 518 U.S. 37 (1996).....17
Pickens v. Gibson, 206 F.3d 988 (10th Cir. 2000) 23, 24
Rock v. Arkansas, 483 U.S. 44 (1987).....17, 20
Romano v. Gibson, 239 F.3d 1156 (10th Cir. 2001) 10
Taylor v. Illinois, 484 U.S. 400 (1988).....17
United States v. Scheffer, 523 U.S. 303 (1998).....17
Williams v. Taylor, 529 U.S. 362 (2000) 13, 14, 15
Woodford v. Visciotti, 537 U.S. 19 (2002).....5, 21

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254(d) 2, 13, 24, 25

28 U.S.C. § 2254(e)(1) 14, 24, 25

Okla. Stat. tit. 12, § 2401 (1981) 3

Okla. Stat. tit. 12, § 2403 (1981) 4, 10, 16, 18

Okla. Stat. tit. 21, § 152(4) (1981) 3, 7, 16

Okla. Stat. tit. 21, § 652 (1981) 6

Okla. Stat. tit. 21, § 701.7 (Supp.1982) 6

Okla. Stat. tit. 22, § 1175.1 (1981) 3, 7, 16

OTHER

U.S. Const. amend. XIV(1) 2

Antiterrorism and Effective Death Penalty Act of 1996, 142 Cong. Rec. H3305-01 (1996) 4

PETITION FOR WRIT OF CERTIORARI

Mike Mullin, Warden, Oklahoma State Penitentiary, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") is reported at 312 F.3d 1201 (10th Cir. 2002); however, a modified and corrected opinion is reported at 326 F.3d 1122 (10th Cir. 2003) and is reprinted at pages 1 to 23 of the accompanying appendix to this petition ("App."). The Order of March 4, 2003, denying the Petition for Rehearing and Suggestion for Rehearing En Banc is reported at 326 F.3d 1122 (10th Cir. 2003) and is reprinted at pages 171 to 172 of the appendix.

The District Court's Order entered November 27, 2000, has not been reported. It is reprinted at pages 24 to 130 of the appendix. Additionally, the Opinion of the Oklahoma Court of Criminal Appeals is reported at 867 P.2d 1289 (Okla.Crim.App.1992) and is reprinted at pages 131 to 160 of the appendix. The Oklahoma Court of Criminal Appeals granting rehearing but denying relief is also reprinted at pages 161 to 170 of the appendix.

STATEMENT OF JURISDICTION

The Judgment and Opinion of the Tenth Circuit was entered on December 10, 2002 (App. 1). The Order denying Petition for Rehearing and Suggestion for Rehearing En

Banc was entered on March 4, 2003 (App. 171). An Order granting an extension of time to file this petition was rendered by this Court on May 27, 2003, establishing a date of August 1, 2003, on which the petition would be due to be filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV(1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

28 U.S.C. § 2254(d):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Okla. Stat. tit. 21, § 152(4) (1981):

All persons are capable of committing crimes, except those belonging to the following classes:

* * *

4. Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness.

Okla. Stat. tit. 22, § 1175.1 (1981):

As used in this act:

1. "Competent" or "competency" means the present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him, and is able to effectively and rationally assist in his defense. A person may be incompetent due to physical disability;

Okla. Stat. tit. 12, § 2401 (1981):

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence.

Okla. Stat. tit. 12, § 2403 (1981):

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise.

STATEMENT OF THE CASE

This case presents this Court with an opportunity to resolve a direct conflict between decisions of this Court and decisions of the United States Court of Appeals for the Tenth Circuit regarding the standard of deference afforded the highest state courts by the Antiterrorism and Effective Death Penalty Act of 1996, 142 Cong. Rec. H3305-01 (1996) ("AEDPA"). Contrary to this Court's decision in *Early v. Packer*, 537 U.S. 3 (2002), the Tenth Circuit in the present matter improperly conducted de novo review of an issue that had previously been addressed on the merits by the Oklahoma Court of Criminal Appeals.

In granting Respondent federal habeas relief, the Tenth Circuit engaged in de novo review of Respondent's claim of denial of due process without initially showing how the decision of the Oklahoma Court of Criminal Appeals was contrary to any Supreme Court precedent. Rather, the court simply concluded that since the Oklahoma Court of Criminal Appeals failed to cite any federal law in its review of the issue, the state court must have only considered the corresponding state law issue. Therefore,

based merely upon the state court's failure to cite federal law, the Tenth Circuit conducted de novo review of Respondent's due process claim pursuant to *Chambers v. Mississippi*, 410 U.S. 284 (1973). However, due to this Court's decision in *Early v. Packer*, 537 U.S. 3 (2002), it is apparent that the Tenth Circuit's decision to conduct de novo review directly conflicts with controlling Supreme Court precedent.

Additionally, less than fifteen (15) days after denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc, in *Cook v. McKune*, 323 F.3d 825, 831 (10th Cir. 2003), the Tenth Circuit acknowledged the direct conflict asserted herein. Relying on *Early v. Packer*, the Tenth Circuit in *Cook* recognized that failure to discuss or even be aware of federal precedent does not render a state court's decision unworthy of the deference to which it is entitled. *Cook*, 323 F.3d at 831.

A. Proceedings in the State Courts.

On January 30, 1986, Respondent, Cyril Wayne Ellis, went on a shooting rampage in which he murdered Teresa Thomas, Carl Lake, and James Rider. Respondent also critically injured Robert Dumas, Tameca Thomas, Gordon Moore, and Ancil Davis.

Respondent was tried by jury in the District Court of Oklahoma County in Case No. CRF-86-651. Prior to trial, Respondent had undergone a competency evaluation conducted by R.D. Garcia, M.D., a forensic psychiatrist. During trial, Respondent sought admission of Dr. Garcia's competency evaluation report to support his defense of insanity. The trial court, after considering arguments from both the prosecutor and defense attorney, found the report to be

irrelevant as nothing in the report was directed to the issue of Respondent's sanity at the time of the shootings.

Respondent was convicted of three (3) counts of Murder in the First Degree in violation of Okla. Stat. tit. 21, § 701.7 (Supp.1982) and four (4) counts of Shooting with Intent to Kill in violation of Okla. Stat. tit. 21, § 652 (1981). The jury found the existence of three aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel; (2) the defendant knowingly created a great risk of death to more than one person; and (3) the existence of a probability that appellant would commit criminal acts of violence that would constitute a continuing threat to society. Respondent was sentenced to death on the Murder counts and at 2,000; 3,000; 1,000; and 1,000 years imprisonment, respectively, on the Shooting with Intent to Kill counts.

Respondent appealed his conviction to the Oklahoma Court of Criminal Appeals. In his direct appeal, Respondent raised numerous claims. One claim raised by Respondent was that the trial court denied him the right of presenting a defense by not allowing the admission of records of his competency evaluation during the guilt phase of the trial. The Oklahoma Court of Criminal Appeals found this proposition of error to be without any merit (App. 139).

Pursuant to Oklahoma law, an accused's competency to stand trial is an entirely different issue than the defense of insanity. *Miller v. State*, 751 P.2d 733, 736-37 (Okla.Crim.App.1998). When reviewing Respondent's claim, the Oklahoma Court of Criminal Appeals found that "[a]ny probative value was substantially outweighed by the danger of misleading the jury and confusing the issues of

competency and sanity." (App. 139). The court reasoned as follows:

> Nothing in the Eastern State Hospital records was directed to the question of sanity, which is whether appellant was capable of knowing the wrongfulness of his acts when he committed them. *See* 21 O.S.1981, § 152(4). Rather, the examination was directed solely to the question of competency, i.e., whether appellant had the ability at the time of trial to understand the nature of the charges and proceedings brought against him, and was able to effectively and rationally assist in his defense. *See* 22 O.S.1981, § 1175.1. Appellant sought to introduce the records merely because they were authentic.

(App. 139). Accordingly, the court found that the contested evidence was not relevant to Respondent's defense of insanity and, therefore, found that the trial court properly excluded such evidence.

B. Proceedings in the District Court.

On November 19, 1997, Respondent filed a Petition for Writ of Habeas Corpus with the United States District Court for the Western District of Oklahoma. Respondent again claimed that the trial court prevented him from presenting a defense of insanity by excluding Dr. Garcia's competency evaluation report from first stage proceedings. Upon review of the claim, the District Court held that the Oklahoma Court of Criminal Appeals had addressed the claim on the merits and properly found that under Oklahoma law, the trial court did not err in excluding Dr. Garcia's report. Specifically, the District Court held as follows:

At trial, defense counsel proffered Dr. Garcia's report and the records from Eastern State Hospital in support of the insanity defense. The trial court sustained the state's objection to this report and accompanying records, explaining that they were addressed to the issue of the Petitioner's competency to stand trial, which was "a different issue than [knowing] right or wrong at the time" of the acts. (Tr. IV, p. 256). In response to the trial judge's queries, defense counsel could point to no specific evidence in the report or records bearing upon whether the Petitioner knew right from wrong at the time of the acts. (Tr. IV, p. 256-257). On the Petitioner's direct appeal, the state appellate court reiterated that: "It is well settled that the question of an accused's present competency to stand trial is an entirely different matter than the defense of insanity." 867 P.2d at 1296, *citing Miller v. State of Oklahoma*, 751 P.2d 733 (Okla.Crim.App.1988). The appellate court agreed with the trial court's assessment: "Nothing in the Eastern State Hospital records was directed to the question of sanity, which is whether appellant was capable of knowing the wrongfulness of his acts when he committed them. Rather, the examination was directed solely to the question of competency, i.e., whether appellant had the ability at the time of trial to understand the nature of charges and proceedings brought against him, and was able to effectively and rationally assist in his defense." 867 P.2d at 1296 (*citation omitted*).

The Court agrees that Dr. Garcia's report and the Petitioner's medical records are directed to the question of the Petitioner's ability to stand trial, rather than to the issue of his sanity at the time of the crimes. The Court further agrees with

> the state courts' findings that any probative value of the report and medical records was "outweighed by the danger of misleading the jury and confusing the issues of competency and sanity." 867 P.2d at 1297. The Court further finds that the trial court's exclusion of this evidence did not render the trial so fundamentally unfair as to constitute the denial of a federal constitutional right.

(App. 88-89) (footnote omitted).

The District Court continued by noting that even though the trial court's order directed the Department of Mental Health to assess whether Respondent was competent to stand trial and whether he was "'competent at the time these acts were alleged to have been committed,'" it is apparent that "Dr. Garcia's report and the accompanying staff notes are addressed to the issue of competency to stand trial, and not to the insanity defense." (App. 89, n.60). The District Court, by properly giving deference to the state court decision, found that Respondent could point to nothing in the excluded report of Dr. Garcia that addressed the issue of legal insanity (App. 89, n.60). Therefore, the District Court determined that Respondent was not entitled to federal habeas relief on his *Chambers* due process issue (App. 90).

C. Proceedings in the Tenth Circuit.

Respondent timely appealed the District Court's Order denying his Petition for Writ of Habeas Corpus. Based upon Respondent's *Chambers* issue, the Tenth Circuit reversed the decision of the District Court and granted Respondent federal habeas corpus relief (App. 13).

The Tenth Circuit concluded that the state court failed to address Respondent's claim concerning the trial court's denial of his right to present a defense of insanity (App. 10). This conclusion was based solely on the fact that the state court did not cite any federal authorities when reviewing Respondent's claim. Since it was determined that the state court failed to address Respondent's constitutional claim on the merits, the Tenth Circuit conducted de novo review of the claim. Specifically, the Tenth Circuit reasoned as follows:

> In his brief to the OCCA on direct appeal, Ellis challenged the exclusion of the Garcia report on various grounds, including *Chambers*. The OCCA, however, upheld the exclusion without any reference to Ellis's *Chambers* claim, holding only that the report properly was excluded under state law. *Ellis v. State*, 867 P.2d 1289, 1296-97 (Okla. Crim. App. 1992) (concluding that, under 12 Okla. Stat. § 2403 (1981), the evidence properly was excluded because its probative value was substantially outweighed by the danger of confusing the jury). Because the OCCA did not consider Ellis's federal constitutional claim, our review is *de novo*. *Romano v. Gibson*, 239 F.3d 1156, 1166 (10th Cir. 2001) (reviewing *de novo* where "on direct appeal, [petitioners] did challenge the trial court's exclusion of this evidence on federal constitutional grounds, [but] the [OCCA] addressed these claims only under state law"). *Le v. Mullin*, 311 F.3d 1002, 1010 (10th Cir. 2002).

(App. 10).

Upon conducting de novo review of Respondent's *Chambers* claim, the Tenth Circuit, in direct contrast to

the decision of the Oklahoma Court of Criminal Appeals, found that Dr. Garcia's report contained material critical to Respondent's defense of insanity. By deeming the report exculpatory, the Tenth Circuit found that the trial court's exclusion of the report violated Respondent's "due process right to present evidence critical to his defense." (App. 13).

REASONS FOR GRANTING THE WRIT

The Court's review of this matter is necessary because:

A. The decision of the Tenth Circuit directly conflicts with this Court's decision in *Early v. Packer*, inappropriately disregards the deference provisions mandated by the Antiterrorism and Effective Death Penalty Act of 1996, and improperly expands federal habeas corpus jurisdiction.

B. Subsequent to denying Petitioner's request for rehearing, the Tenth Circuit acknowledged that it erred in conducting de novo review of Respondent's *Chambers* claim; therefore, certiorari review by this Court is Petitioner's only redress for correcting the Tenth Circuit's professed error and the blatant injustice that has occurred in this matter.

A.

The decision of the Tenth Circuit directly conflicts with this Court's decision in *Early v. Packer*, inappropriately disregards the deference provisions mandated by the Antiterrorism and Effective Death Penalty Act of 1996, and improperly expands federal habeas corpus jurisdiction.

In the opinion of December 10, 2002, the Tenth Circuit Court of Appeals, following in the precise footsteps of the Ninth Circuit which this Court reprimanded in *Early v. Packer*, 537 U.S. 3 (2002), improperly engaged in de novo review of an issue that had been previously addressed on the merits by the highest state court. In accord with the Ninth Circuit's rationale in *Packer*, the Tenth Circuit, prior to engaging in de novo review, failed to show how the decision of the Oklahoma Court of Criminal Appeals was contrary to any Supreme Court precedent. Instead, the Tenth Circuit merely concluded that since the Oklahoma Court of Criminal Appeals did not cite federal law in its review of the issue, the state court must have only considered the state law issue (App. 10). Therefore, based merely upon the state court's failure to cite federal law, the Tenth Circuit conducted de novo review of Respondent's due process claim pursuant to *Chambers v. Mississippi*, 410 U.S. 284 (1973). However, due to this Court's decision in *Early v. Packer*, it is apparent that the Tenth Circuit's decision to conduct de novo review directly conflicts with controlling Supreme Court precedent.

Pursuant to the AEDPA, a petition for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1-2). Accordingly, a petitioner must show that the state court's decision was either contrary to clearly established law by the Supreme Court or involved an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. As explained in *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000):

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

The Supreme Court concluded that under the "unreasonable application" clause, a federal habeas court must ask whether the state court's application of Supreme Court law was objectively unreasonable. Therefore, under such clause, "a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied

clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." *Williams*, 529 U.S. at 411. Additionally, state court determinations of fact "shall be presumed correct" unless the presumption is rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

This Court, in *Early v. Packer*, 537 U.S. 3 (2002), expounded on the "contrary to" phrase. In *Packer*, the Court unanimously reversed a Ninth Circuit decision which held that a state appellate court's decision was "contrary to" clearly established Supreme Court precedent. *Packer*, 123 S.Ct. at 366. The underlying issue was whether a state trial court's charge to a deadlocked jury was coercive and denied the petitioner his due process right to a fair and impartial trial. *Packer*, 123 S.Ct. at 364. The California Court of Appeals held that the charge was not coercive; however, the Ninth Circuit observing "that the state court 'failed to cite . . . any federal law'" conducted a de novo review of the issue and ordered that habeas relief be granted. *Packer*, 123 S.Ct. at 365. This Court, when reversing, criticized the Ninth Circuit's conclusion that a state court decision is "contrary to" federal law simply because it failed to cite the controlling federal precedent. *Id.* This Court held that as long as a state court's reasoning and result do not directly contradict clearly established precedent the "contrary to" requirement is not met. *Id.* Specifically, this Court stated:

> A state-court decision is "contrary to" our clearly established precedents if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result

> different from our precedent." *Williams v. Taylor*, 529 U.S. 362, 405-406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Avoiding these pitfalls does not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.

Packer, 123 S.Ct. at 365 (emphasis original). *See also Woodford v. Visciotti*, 537 U.S. 19 (2002) (holding that the Ninth Circuit Court of Appeals failed to observe the distinction between an "incorrect application of federal law" and an "unreasonable application of federal law").

In the present case, the Tenth Circuit, in direct violation of *Early v. Packer*, improperly engaged in de novo review of an issue which had been addressed on the merits by the Oklahoma Court of Criminal Appeals. Based merely on the state court's failure to cite federal law, the Tenth Circuit refused to afford any deference to the state court decision and concluded that the trial court had improperly excluded evidence critical to Respondent's insanity defense in violation of *Chambers v. Mississippi*, 410 U.S. 284 (1973).

A review of the opinion of the Oklahoma Court of Criminal Appeals reveals that the court properly analyzed the constitutional issue of whether the exclusion of the contested evidence prevented Respondent from presenting a defense. Specifically, the court found as follows:

> Prior to trial appellant was examined to determine whether he was competent to stand trial. At trial, appellant offered the records of his competency evaluation conducted at Eastern State Hospital to support his defense of insanity.

> The State objected on the ground that competency and insanity are distinct issues and the records from Eastern State Hospital would be irrelevant to the issue of insanity. The trial court sustained the objection. Appellant seeks reversal claiming that the trial court's ruling prevented him from presenting evidence material to his only defense.
>
> It is well settled that the question of an accused's present competency to stand trial is an entirely different matter than the defense of insanity. *See Miller v. State*, 751 P.2d 733 (Okla.Cr.1988). Nothing in the Eastern State Hospital records was directed to the question of sanity, which is whether appellant was capable of knowing the wrongfulness of his acts when he committed them. *See* 21 O.S.1981, § 152(4). Rather, the examination was directed solely to the question of competency, i.e., whether appellant had the ability at the time of trial to understand the nature of the charges and proceedings brought against him, and was able to effectively and rationally assist in his defense. *See* 22 O.S.1981, § 1175.1. Appellant sought to introduce the records merely because they were authentic.

(App. 138-39). Based on these findings of fact, the Oklahoma Court of Criminal Appeals found that pursuant to Okla. Stat. tit. 12, § 2403 (1981), the trial court properly excluded the contested evidence as "[a]ny probative value was substantially outweighed by the danger of misleading the jury and confusing the issues of competency and sanity." (App. 139). Since the state court found that the evidence was not relevant to support Respondent's defense, the court was not required to further determine

whether or not Respondent's constitutional right to present a defense under *Chambers* had been violated by the exclusion of the irrelevant evidence.

Pursuant to *Chambers*, "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 294. However, a defendant's interest in presenting relevant evidence must "bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295. *See also Taylor v. Illinois*, 484 U.S. 400, 410 (1988); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987). As a result, "the Constitution leaves to the judges who must make these decisions 'wide latitude' to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (*quoting Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

When reviewing a *Chambers* claim, a court initially must ascertain that the excluded evidence is not merely relevant, but is critical to a defendant's defense. *Chambers*, 410 U.S. at 295. If the court deems the excluded evidence critical, the court must then determine whether the exclusion of the evidence was unconstitutionally arbitrary or disproportionate. *Rock*, 483 U.S. at 56. A state law justification for exclusion of evidence is considered "unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). As set forth in *Montana v. Egelhoff*, 518 U.S. 37, 51 (1996) this Court's holding in *Chambers* "is certainly not that a defendant is denied 'a fair opportunity to defend against the State's accusations' whenever 'critical evidence'

favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation."

In the instant matter, it is apparent that the decision of the Oklahoma Court of Criminal Appeals is not contrary to this Court's holding in *Chambers*. Upon reviewing Respondent's *Chambers* claim upon appeal, the Oklahoma Court of Criminal Appeals reviewed the excluded evidence and found such to be irrelevant to Respondent's defense of insanity. By deeming the evidence irrelevant and, therefore, not critical to Respondent's defense of insanity, the Oklahoma Court of Criminal Appeals did not need to determine whether or not the exclusion of the evidence was unconstitutionally arbitrary or disproportionate. Nevertheless, although the court determined that the evidence was irrelevant, the court, citing Okla. Stat. tit. 12, § 2403 (1981), further found that "[a]ny probative value was substantially outweighed by the danger of misleading the jury and confusing the issues of competency and sanity." This Court has held that wide latitude to exclude even relevant evidence is given trial judges when such evidence confuses the issues. *Crane*, 476 U.S. at 689. Thus, it is clear the Oklahoma Court of Criminal Appeals properly addressed Respondent's *Chambers* claim on the merits and found that the excluded evidence was not critical to Respondent's defense of insanity.

Moreover, the decision of the Oklahoma Court of Criminal Appeals upholding the trial court's exclusion of Dr. Garcia's report was not contrary to this Court's decision in *Chambers* or its progeny. As pointed out by Senior Circuit Judge Brorby in his dissent, nothing in Dr. Garcia's report indicates whether Respondent knew right from wrong at the time he committed the offenses, i.e., legal

sanity (App. 20). Petitioner concedes that the court order directing a competency evaluation of Respondent includes the additional question of "Was this person competent at the time these acts were alleged to have been committed?" (App. 89, n.60). However, it is evident from Dr. Garcia's report that he did not consider this question when conducting a competency evaluation of Respondent. According to Dr. Garcia's report, he concluded and recommended only as follows:

> **CONCLUSIONS AND RECOMMENDATIONS TO COURT ORDER QUESTIONS:**
>
> 1. Yes, he is a person able to appreciate the nature of the charges against him.
>
> 2. Yes, he is a person able to consult with his lawyer and rationally assist in the preparation of his defense.
>
> 3. Not applicable.
>
> 4. No, he is not a mentally ill person or a person requiring treatment as defined by Oklahoma Statute Title 43A, Section 3. His illness in [sic] now in remission at the present time.
>
> 5. No, this is a person if released without treatment, therapy, or training in my estimation, he possibly would not pose a significant threat to the life and/or safety of himself or others.

(App. 174). Clearly, when evaluating Respondent, Dr. Garcia did not consider the court's sixth question concerning competency at the time of the incidents. As Dr. Garcia did not consider Respondent's competency at the time of the incidents, there is nothing in the report relevant to Respondent's defense of insanity. Therefore, the trial court

was correct in excluding Dr. Garcia's report as the Respondent does not have a due process right to present irrelevant evidence. *Rock*, 483 U.S. at 55 (holding that a defendant has a constitutional right to present relevant testimony).

Additionally, except for Dr. Garcia's determination of competency, the report consists only of statements made by Respondent to Dr. Garcia and of allegations taken from other hospital records. The report states, "At least he claimed repeatedly, emphatically, without changing his viewpoint and report that he completely blocked out and did not remember the detail of the shooting. . . . He states he had some so-called blackout and cannot remember what he had done." (App. 174-76). Obviously, these are merely statements made by Respondent to Dr. Garcia and not medical conclusions reached by Dr. Garcia.

The cursory conclusions reached in Dr. Garcia's report do not support a claim of legal insanity. Dr. Garcia stated that Respondent "may have had history of schizophrenic or schizophreniform behavior in the past, in complete remission at the present time." (App. 178). The report does not indicate when Respondent's possible schizophrenic behavior went into complete remission. Further, the report fails to explain what it means to have a "dissociative disorder," to have "schizophrenia," or to be "depersonalized." Respondent did not attempt to call an expert witness to explain the significance of such terms and their relevancy to Respondent's defense of insanity. As properly noted by Judge Brorby in his dissent, "Although exclusion of the report may have weakened Mr. Ellis' defense somewhat, it did not prevent him from presenting other evidence, including expert testimony, of his alleged mental disability to the jury. That Mr. Ellis chose not to do so does

not render an otherwise constitutional exclusion of evidence unconstitutional." (App. 22). Accordingly, the state court correctly found that the report was not relevant to Respondent's insanity defense as it offers no medical conclusions regarding legal sanity and is simply testimony that Respondent could have provided to the jury had he opted to take the stand and testify.

Furthermore, even if the decision of the Oklahoma Court of Criminal Appeals regarding Respondent's *Chambers* claim was incorrect, habeas relief was not warranted. In *Woodford v. Visciotti*, 537 U.S. 19, 21 (2002), this Court held that it is not enough to convince a federal habeas court that a state court decision applied federal law incorrectly. Rather, "[t]he federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable." *Visciotti*, 537 U.S. at 21. *See also Bell v. Cone*, 535 U.S. 685, 699 (2002).

In light of the evidence presented in the instant matter, it is reasonable to conclude that the decision of the Oklahoma Court of Criminal Appeals denying Respondent's *Chambers* claim was not improper. As set forth above, in order to succeed on a *Chambers* claim, Respondent must show that evidence critical to his defense was improperly excluded by the trial court. Upon review of Respondent's *Chambers* claim, the Oklahoma Court of Criminal Appeals agreed with the trial court's factual determination and found the excluded report irrelevant to Respondent's defense of insanity as nothing in Dr. Garcia's report discusses Respondent's sanity at the time of the incident (App. 139). As the excluded evidence was irrelevant to Respondent's defense, the Oklahoma Court of

Criminal Appeals' decision denying Respondent's *Chambers* claim was not objectively unreasonable.

Accordingly, the Tenth Circuit, by withholding deference due the state court decision and by conducting its own independent review of the evidence, erroneously granted Respondent habeas corpus relief. Such decision granting habeas relief directly conflicts with this Court's decision in *Early v. Packer*, inappropriately disregards the deference provisions mandated by the AEDPA, and improperly expands federal habeas corpus jurisdiction. Thus, this Court should grant certiorari review to correct this evident error.

B.

Subsequent to denying Petitioner's request for rehearing, the Tenth Circuit acknowledged that it erred in conducting de novo review of Respondent's *Chambers* claim; therefore, certiorari review by this Court is Petitioner's only redress for correcting the Tenth Circuit's professed error and the blatant injustice that has occurred in this matter.

Certiorari review should be granted by this Court as it is Petitioner's only redress for correcting the Tenth Circuit's acknowledged error. On December 23, 2002, Petitioner timely filed a petition with the Tenth Circuit requesting the court conduct en banc rehearing of its grant of federal habeas corpus relief. Utilizing this Court's decision in *Early v. Packer*, Petitioner attempted to persuade the Tenth Circuit that it erred in conducting de novo review of Respondent's *Chambers* issue. After review of Petitioner's request, a majority of the active judges denied rehearing en banc (App. 171).

Ultimately, on March 18, 2003, less than fifteen (15) days after denying rehearing in the present matter, the Tenth Circuit, in *Cook v. McKune*, 323 F.3d 825, 831 (10th Cir. 2003), acknowledged that it erred in conducting de novo review of Respondent's *Chambers* claim. In *Cook v. McKune*, the Kansas Supreme Court reviewed the defendant's constitutional claim solely under state law without any citation or discussion of federal authorities. *Cook*, 323 F.3d at 830-31. Recognizing the deference standard of the AEDPA, the Tenth Circuit determined that the state court had properly adjudicated the defendant's constitutional claim regarding the Confrontation Clause. Specifically, the Tenth Circuit held:

> There is no question but that the Kansas courts disposed of Cook's objections to Rudell's testimony on the merits, rather than on some procedural ground. Judge Brorby discussed the tension between these lines of cases in his dissent in *Ellis v. Mullin*, 312 F.3d 1201, 1209-10 (10th Cir. 2002). Whatever discord exists between our decisions was resolved by *Early v. Packer*, 537 U.S. 3, 123 S.Ct. 362, 365, 154 L.Ed.2d 263 (2002) (per curium), in which the Supreme Court said that failure to discuss or even to be aware of federal precedent does not in itself render a state court's decision contrary to federal law.

Cook, 323 F.3d at 831. Accordingly, as the Tenth Circuit has acknowledged its error in the present matter, this Court should grant certiorari review to correct such error.

Besides conflicting with this Court's authority, the Tenth Circuit's decision to conduct de novo review of Respondent's *Chambers* claim was inconsistent with its own prior authority. In both *Pickens v. Gibson*, 206 F.3d

988, 997 (10th Cir. 2000) and *Aycox v. Lytle*, 196 F.3d 1174, 1177-78 (10th Cir. 1999), the Tenth Circuit held that the state court determination was entitled to deference under 28 U.S.C. § 2254(d)(1) even though the state court decision lacked analysis and citations to law. The state court decisions, in both cases, were merely summary decisions of the issues lacking even cursory reasoning. In contrast, the Tenth Circuit, in the present matter, withheld deference from a state court determination that thoroughly explained its decision and cited to state law. Therefore, in light of *Pickens* and *Aycox*, the Tenth Circuit's de novo review of Respondent's *Chambers* claim was patently improper as it is incongruous for the Tenth Circuit to give no deference to decisions where state courts articulate reasons for their decisions but accord deference to state court summary decisions where no explanation is offered.

Respondent was convicted in 1986, over seventeen (17) years ago. By using an improper standard of review, the Tenth Circuit granted Respondent federal habeas relief. In light of the fact that an improper standard of review was utilized and the court utilizing such improper standard has acknowledged its error, the Tenth Circuit's order remanding the case for a new trial can only be deemed blatant injustice.

Every court which has reviewed Dr. Garcia's report, with the exception of two (2) judges in the Tenth Circuit, has found nothing in the excluded report which addresses the issue of legal sanity. Pursuant to §§ 2254(d)(2) and 2254(e)(1) of the AEDPA, habeas relief may only be granted if the state court factual determination is unreasonable in light of the evidence presented. Respondent has the burden of rebutting the presumption that all state court factual determinations shall be presumed correct by

presenting clear and convincing evidence. *See* 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1). Respondent has not and cannot rebut such presumption.

Additionally, during second stage proceedings, Dr. Garcia's report was admitted into evidence. However, even after reviewing the alleged critical evidence, the jury recommended Respondent receive a sentence of death on each of the three (3) murder convictions and a total of seven thousand (7,000) years imprisonment for the four (4) shootings with intent to kill convictions. From the jury's recommendation, it is clear that Dr. Garcia's report did not contain any evidence critical to Respondent's defense of insanity.

Since the Tenth Circuit denied rehearing in this case, Petitioner has no further redress for correcting the Tenth Circuit's acknowledged error except through certiorari review by this Court. Therefore, certiorari review by this Court is warranted to correct the blatant injustice that has occurred in this matter.



CONCLUSION

For the reasons stated above, Petitioner, Mike Mullin, respectfully requests this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CYRIL WAYNE ELLIS, Petitioner-Appellant, v. MIKE MULLIN, Warden, Oklahoma State Penitentiary, Respondent-Appellee.	No. 01-6004

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(D.C. No. CIV-97-1386-R)

(Filed December 10, 2002)
(As Amended on Partial Denial of Rehearing
and Rehearing En Banc March 4, 2003)

Scott W. Braden, Assistant Federal Public Defender, Oklahoma City, Oklahoma, for Petitioner-Appellant

Nancy E. Connally, Assistant Oklahoma Attorney General (W.A. Drew Edmondson, Oklahoma Attorney General, and Jennifer B. Miller, Assistant Oklahoma Attorney General, on the brief), Oklahoma City, Oklahoma, for Respondent-Appellee

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Before **EBEL**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **MURPHY**, Circuit Judge.

EBEL, Circuit Judge.

Cyril Wayne Ellis is a schizophrenic man who went on a ninety-minute killing spree that left three people dead and four wounded in Oklahoma in 1986. Ellis received three death sentences. This case comes to us on appeal from the district court's denial of Ellis's petition for habeas corpus under 28 U.S.C. § 2254. Ellis raises a host of claims in his habeas petition, most of them related to his mental illness.[1] We conclude that the trial court improperly excluded critical evidence of Ellis's insanity in violation of *Chambers v. Mississippi*, 410 U.S. 284 (1973), and we reverse.

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[1] Ellis asserts six grounds for reversal of the district court's denial of habeas relief. First, he argues that his trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to discover evidence that Ellis had been diagnosed as schizophrenic only weeks before the incident, as well as other mitigating evidence regarding his life history (and that appellate counsel was ineffective for failing to raise this issue). Second, he argues that he was wrongly denied the opportunity to voir dire potential jurors individually, outside the presence of the rest of the venire, regarding their views on the death penalty. Third, he challenges the insanity instruction given at trial. Fourth, he argues that the exclusion of evidence of a pre-trial psychiatric examination resulting in a schizophrenia diagnosis prevented him from presenting his defense in violation of *Chambers v. Mississippi*. Fifth, he argues that the trial court violated *Cooper v. Oklahoma*, 517 U.S. 348 (1996), by applying an unconstitutional burden of proof for competency. Sixth and finally, he argues that under *Ford v. Wainwright*, 477 U.S. 399 (1986), he cannot be executed because he is insane. Because we conclude below that Ellis is entitled to habeas relief on the fourth issue, we do not reach his remaining claims.

I. BACKGROUND

A. The shootings

The facts regarding the killings are undisputed. On January 26, 1986, Ellis argued with his fiancée Cheryl James and struck her. Later that day he felt remorseful and consumed an overdose of pills in an apparent suicide attempt. He was hospitalized and admitted to the psychiatric ward. Cheryl visited him at the psychiatric ward for several hours on January 29, and when she left he came running out after her and forced her to drive them away. Cheryl became afraid and found help, but when the police arrived she declined to press charges. Later that day, Ellis tried to buy a gun, discovered he did not have enough money, and borrowed a gun from one of the store clerks instead.

The next morning, Ellis was driving in his car when he noticed Cheryl riding in a car with her sister's boyfriend, Robert Dumas. Ellis pulled alongside and Dumas pulled away. As Ellis sped after him, Dumas drove into a yard and Ellis blocked him in. Cheryl fled on foot, but Ellis stopped Dumas and ordered him into the trunk of the car. From inside, Dumas began pounding on the trunk, whereupon Ellis opened the trunk, said "I see you don't want to live," shot him twice, and closed the trunk. Dumas survived.

Ellis proceeded to Dumas's house. Cheryl was not there, but Cheryl's sister Teresa Thomas was there with Thomas's six-year old daughter Tameca. Ellis chased Thomas through the house, shooting her repeatedly and fatally. He also shot Tameca three times, but she lived.

Ellis went home to get more ammunition, then went to his place of employment. Seeing employee Gordon Moore in the parking lot, Ellis ordered him to his knees and shot him in the face. Moore survived. Ellis went inside

and shot and killed another employee, Carl Lake, with two shots. He stepped out to the loading dock, fired repeatedly, and killed James Rider. Ellis got into his car and began to drive away, shooting and injuring his final victim, Ancil Davis, on the way out.

B. Trial

Ellis was charged with capital murder. Prior to trial, the trial judge ordered that Ellis be examined by doctors at the Oklahoma department of mental health. The court stated that "there is a doubt as to the competency of the said CYRIL WAYNE ELLIS, by reason of the actions of the defendant and statements regarding the defendant's ability to understand the proceedings against the defendant and the defendant's capability of knowing right from wrong at the time these alleged actions took place." In addition to questions clearly regarding competency to stand trial, the court also directed the doctors to address: "Was this person competent at the time these acts were alleged to have been committed?"

Pursuant to this order, Ellis was admitted to Eastern State Hospital on March 5, 1986 (roughly a month and a half after the shootings) and was seen until his release on April 2. Dr. R.D. Garcia,[2] Chief Forensic Psychiatrist at the hospital, prepared a discharge report. In this report, Dr. Garcia stated a final diagnosis of "Schizophrenia,

[2] Dr. Garcia, we have noted, "was himself suffering from severe untreated bipolar disorder" during this time. *Williamson v. Ward*, 110 F.3d 1508, 1519 (10th Cir. 1997). Neither party to the present appeal argues that his conclusions (some of them favorable to Ellis, some favorable to the State) should be deemed unreliable.

paranoid type, chronic in complete remission spontaneously without any medication."

Dr. Garcia's report offered several relevant observations:

> He had a severe dissociative disorder in the past with psychogenic headaches, and may have been completely depersonalized at the time of the incident. At least he claimed repeatedly, emphatically, without changing his viewpoint and report that he completely blocked out and did not remember the detail of the shooting. . . .
>
> . . . .
>
> His thought content on the mental status[3] revealed he was hearing voices, felt that no one cares about him, he might as well do away with himself, and he cannot trust people anymore. He was suspicious and paranoid. He felt his body was frozen by the demons and spirits trying to take over his body and his spirit. He began feeling that even the doctors were against him and he began talking and thinking about it since December of 1985. . . .
>
> . . .
>
> . . . . Much, much improved spontaneously [upon discharge]. . . . Only suicidal thoughts when he left. Competent in the psychological, legal, and sociological point of view at this time. He may have had history of schizophrenic or schizophreniform behavior in the past, in complete remission at the present time. He is definitely

[3] This refers to the status obtained near the beginning of the mental evaluation.

> competent to stand trial at the present time, knowing right from wrong and capable of testifying in his defense.

Dr. Garcia died prior to trial and thus was unavailable to testify.

At the guilt phase of the trial, Ellis's sole strategy was to argue that he was insane when he committed the murders. To this end, Ellis elicited testimony from several witnesses, none of them medical professionals, regarding events in the weeks prior to the shootings. Summarized in approximate chronological order, there was testimony that in the weeks immediately prior to the shooting Ellis passed out in the bathroom at work; was hospitalized for a head injury; suffered a seizure while driving; was hospitalized for a deliberate overdose of pills; was transferred to the psychological ward at the hospital the day before the shootings; told his sister he was hearing voices; escaped from the psychological ward and kidnaped his fiancée; was "in a daze," "like I wasn't even there talking to him," "confused," "sat there and stared directly at me, like straight through," and "lost" after the confrontation with his fiancée and police the day before the shootings. In addition to this testimony, Ellis attempted also to introduce Dr. Garcia's report into evidence, to which the prosecution objected only on grounds of relevancy and Rule 403. The trial court sustained the objection because the report "only goes as to his competency to stand trial, and his opinion does not go to the insanity at the time he committed the acts."

In its closing argument, the prosecution argued that Ellis had failed to establish his insanity, emphasizing the lack of evidence from medical professionals:

> We know that he was in the hospital. We know that he was in the psych ward, that he had voluntarily committed himself to that establishment. You have heard no evidence from any professional, nurse, doctor, of any sort, to say this man on that day did not know right from wrong. . . . I submit to you, folks, that you have heard absolutely no evidence, zero evidence, that this man did not know right from wrong on the day of that shooting.

Indeed, the prosecution argued forcefully that Ellis was faking insanity, stating, "This insanity defense that Mr. Ellis has brought to you is what I refer to as instant insanity. It's like instant mashed potatoes." Summarizing evidence that Ellis acted deliberately and understood events around him,[4] the prosecution concluded, "Again, instant insanity, insanity to his liking, insanity to justify these acts. That's what he is doing, folks: . . . He's a con." The defense waived closing argument.

The jury found Ellis guilty of all three counts of first degree murder and all four counts of shooting with intent to kill.

At the sentencing phase of the trial, Ellis offered additional testimony regarding his insanity from lay

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[4] Representative of the prosecution's summary is the following:

> Then the voice leaves him, and I guess he runs around the back of the house to see what is happening. Then the voice comes back again, and he runs over and he shoots Teresa three or four more times.
>
> The voice leaves. Then he sees Tameca; and the voice comes back, and he shoots Tameca. That's the way his insanity is working, folks.

witnesses who believed Ellis had "a condition" and "deep emotional problems," and who had heard Ellis threaten suicide. Ellis's minister's wife testified that in a Sunday prior to the shooting, Ellis stood up in church and wept, saying "this thing that's in my mind is trying to get me to destroy myself . . . I need help." Ellis's attorney then introduced the Garcia report that the court had excluded at the first phase. In addition, Ellis presented testimony from family and friends who cared about him and introduced evidence showing that he was active in his church, volunteered for children, helped a car-accident victim, had no prior felony convictions, and showed remorse when questioned by police. After the jury deliberated for over eighteen hours, Ellis received death sentences on each of the three murder counts and sentences of between 1,000 and 3,000 years on each of the shootings with intent to kill charges.

C. Appeal and post-conviction challenges

Ellis's direct appeal was denied. *Ellis v. State*, 867 P.2d 1289 (Okla. Crim. App. 1992). The Oklahoma Court of Criminal Appeals (OCCA) rejected Ellis's argument that the Garcia report should have been admitted at the guilt phase, reasoning as follows:

> Nothing in the Eastern State Hospital records was directed to the question of sanity, which is whether appellant was capable of knowing the wrongfulness of his acts when he committed them. See 21 O.S.1981, § 152(4). Rather, the examination was directed solely to the question of competency, i.e. whether appellant had the ability at the time of trial to understand the nature of the charges and proceedings brought against

> him, and was able to effectively and rationally assist in his defense. *See* 22 O.S.1981, § 1175.1. Appellant sought to introduce the records merely because they were authentic. Any probative value was substantially outweighed by the danger of misleading the jury and confusing the issues of competency and sanity, 12 O.S.1981, § 2403, and we find that the trial court ruled properly.

Id. at 1296-97. Ellis's subsequent petition for post-conviction relief was denied. *Ellis v. State*, 941 P.2d 527 (Okla. Crim. App. 1997).

Ellis then filed the present habeas petition in federal district court, in which he again challenged, inter alia, the exclusion of the Garcia report. The district court rejected all of Ellis's claims. Addressing Ellis's *Chambers* claim regarding the exclusion of the Garcia report, the court adopted the OCCA's reasoning in its entirety. It acknowledged in a footnote that the trial court directed the doctors to assess competency at the time the acts were committed, but stated that "[i]t is nevertheless clear that Dr. Garcia's report and the accompanying staff notes are addressed to the issue of competency to stand trial, and not to the insanity defense."

We have jurisdiction under 28 U.S.C. § 2253. Because Ellis filed his habeas petition on December 19, 1997, after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), AEDPA applies.

II. *CHAMBERS* CLAIM

Ellis argues that the trial court's exclusion of Dr. Garcia's pre-trial diagnosis of schizophrenia denied him

due process under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and its progeny by preventing him from presenting his insanity defense. We agree.

In his brief to the OCCA on direct appeal, Ellis challenged the exclusion of the Garcia report on various grounds, including *Chambers*. The OCCA, however, upheld the exclusion without any reference to Ellis's *Chambers* claim, holding only that the report properly was excluded under state law. *Ellis v. State*, 867 P.2d 1289, 1296-97 (Okla. Crim. App. 1992) (concluding that, under 12 Okla. Stat. § 2403 (1981), the evidence properly was excluded because its probative value was substantially outweighed by the danger of confusing the jury). Because the OCCA did not consider Ellis's federal constitutional claim, our review is *de novo*. *Romano v. Gibson*, 239 F.3d 1156, 1166 (10th Cir. 2001) (reviewing *de novo* where "on direct appeal, [petitioners] did challenge the trial court's exclusion of this evidence on federal constitutional grounds, [but] the [OCCA] addressed these claims only under state law"). *Le v. Mullin*, 311 F.3d 1002, 1010 (10th Cir. 2002).

We have stated that "state evidentiary determinations ordinarily do not present federal constitutional issues. . . . However, the Supreme Court, in, *e.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), and *Green v. Georgia*, 442 U.S. 95, 97 (1979) (capital sentencing proceeding), has provided an exception, under some circumstances, if a state court applies the State's evidentiary rules unfairly to prevent a defendant from presenting evidence that is critical to his defense." *Romano*, 239 F.3d at 1166. "[T]o determine whether a defendant was unconstitutionally denied his or her right to present relevant evidence, we must balance the importance of the evidence to the defense against the interests the state has in excluding the

evidence." *Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir. 1997). Further:

> [T]o establish a violation of . . . due process, a defendant must show a denial of fundamental fairness. . . . It is the materiality of the excluded evidence to the presentation of the defense that determines whether a petitioner has been deprived of a fundamentally fair trial. Evidence is material if its suppression might have affected the outcome. In other words, material evidence is that which is exculpatory – evidence that if admitted would create reasonable doubt that did not exist without the evidence.

Richmond, 122 F.3d at 872 (citations and internal quotation marks omitted). *See also Romano*, 239 F.3d at 1168 ("[W]e need ask no more than whether the trial court's application of this state evidentiary rule excluded critical exculpatory evidence.").

The Ellis report was prepared in response to the trial court's specific request for an assessment of Ellis's competency at the time of the shootings, *i.e.* legal sanity. The report diagnosed Ellis as paranoid schizophrenic. It classified his paranoid schizophrenia as "chronic," a term defined in the then-current Diagnostic and Statistical Manual of Mental Disorders (3d ed.-Rev. 1987) (DSM-III-R) as having shown signs of the mental disturbance more or less continuously for more than two years. The report stated that Ellis "had a severe dissociative disorder in the past" and he "may have been completely depersonalized at the time of the incident." The report observed that at the time of the initial status report, Ellis revealed he was hearing voices, and that he "felt his body was frozen by the demons and spirits trying to take over his body." We

cannot agree that "[n]othing" in the report "was directed to the question of sanity." *Ellis*, 867 P.2d at 1296.

Moreover, we conclude that the Garcia report was exculpatory – and thus implicated the fundamental fairness of the trial – because it would have "create[d] reasonable doubt that did not exist without" it. *Richmond*, 122 F.3d at 872. With Dr. Garcia's diagnosis and observations excluded during the guilt phase, Ellis's case for insanity was highly vulnerable to the argument, seized upon by the prosecution in its closing argument as quoted above, that Ellis only began faking mental illness around the time of the killings. The prosecution emphasized during the guilt phase that Ellis introduced no diagnosis of insanity and no testimony of medical professionals that he was insane. *See also* Mem. Op. & Order at 46-47 (stating that insanity evidence presented during guilt phase "does not establish that either his alleged head injury, his emotional state, or any mental illness from which he suffered at the time of the shooting were so severe as to prevent him from understanding the nature and consequences of his acts, or from knowing that they were wrong" and "[t]he evidence was clearly not sufficient to enable a reasonable jury to find the Petitioner not guilty by reason of insanity"). The Garcia report would have provided the jury with objective, professional validation of Ellis's longstanding mental illness, validation provided by the Eastern State Hospital's chief forensic pathologist based on extended observation. It is reasonably probable that the Garcia report would have put Ellis's other evidence of mental illness in an altogether different light to the jury.

We reject the district court's conclusion that the value of the Garcia report to the defense was outweighed by the danger of misleading the jury and confusing the issues of

competency and sanity. We note that the jury could have been instructed on the difference and ordered not to blur the two, and "[a] jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). More significantly, under the circumstances any meaningful risk of confusion weighed entirely *against* Ellis. The Garcia report tended to show that Ellis was insane at the time of the crime but was competent now to stand trial. If, as the OCCA and the district court posit, the jury was irremediably likely to be unable to distinguish sanity from competency, their confusion could only lead them to conclude that Ellis was sane then because he is competent now. In theory, of course, the jury could mistakenly conclude that Ellis is incompetent now because he was insane then, but such a conclusion would have been altogether irrelevant: the competency issue was not before the jury because it already had been resolved by the court prior to trial. Thus, even if we were to assume that an instruction could not cure the risk of confusion regarding competency and sanity, it is clear that Ellis alone bore that risk. The state's interest in excluding the Garcia report clearly was outweighed by Ellis's interest in presenting it.

Accordingly, we conclude that Ellis's due process right to present evidence critical to his defense was violated by the trial court's exclusion of the Garcia report during the guilt phase of the trial.

III. CONCLUSION

We REVERSE the judgment of the district court insofar as it denied habeas relief as to the guilt phase of Ellis's trial. We grant the writ subject to the condition that the state retry Ellis within a reasonable time or be subject

to further federal proceedings to consider his release. *See Fisher v. Gibson*, 282 F.3d 1283, 1311 (10th Cir. 2002).

No. 01-6004 – *Ellis v. Mullin*

BRORBY, Senior Circuit Judge, dissenting.

I respectfully dissent. I conclude the Oklahoma Court of Criminal Appeals' decision is an "adjudication on the merits" under the Antiterrorism and Effective Death Penalty Act. I would also uphold the Oklahoma court's factual determination concerning Dr. Garcia's report, especially under the Act's deferential standards in §§ 2254(d)(2) and 2254(e)(1). In addition, I conclude the Oklahoma trial court's exclusion of Dr. Garcia's report was not egregious enough to constitute a due process violation under *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Adjudication on the Merits

The Antiterrorism and Effective Death Penalty Act requires us to deny a habeas petition when a state court adjudicated the petitioner's claim on the merits unless the state court adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *see* 28 U.S.C. § 2254(d)(2). We "presume[ ]" state court factual determinations are correct unless the petitioner rebuts the presumption with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The Oklahoma trial court excluded Dr. Garcia's report because it was irrelevant to the issue of sanity. The court's ruling was based on its factual determination nothing in the report discussed sanity, *i.e.*, whether Mr. Ellis knew right from wrong at the time of the incident. *See Ellis v. State*, 867 P.2d 1289, 1296 (Okla. Crim. App. 1992). In fact, even when questioned by the court, Mr. Ellis could point to nothing in the report bearing upon whether he knew right from wrong at the time of the incident. *Ellis v. Ward*, No. CIV-97-1386-R, slip op. at 50 (W.D. Okla. Oct. 10, 2000).

Mr. Ellis appealed to the Oklahoma Court of Criminal Appeals, arguing the report's exclusion violated due process. The Oklahoma Court of Criminal Appeals, however, affirmed the trial court's ruling, concluding "[n]othing" in Dr. Garcia's report "was directed to the question of sanity"; rather, the report "was directed solely to the question of competency." *Ellis*, 867 P.2d at 1296-97. The court also observed any probative value of Dr. Garcia's report was "substantially outweighed by the danger of misleading the jury and confusing the issues of competency and sanity." *Id.*

Seeing only references to state law in the Oklahoma Court of Criminal Appeals' analysis, the majority concludes the court did not adjudicate the due process claim on the merits and reviews the claim de novo. I disagree and conclude deference is appropriate under the Antiterrorism and Effective Death Penalty Act.

The majority cites in support of its conclusion a line of decisions withholding deference from state court decisions citing only state law (*Romano v. Gibson*, 239 F.3d 1156, 1166 (10th Cir.), *cert. denied*, 122 S. Ct. 628 (2001)). This would be controlling if our decisions were consistent on the

issue of deference under the Antiterrorism and Effective Death Penalty Act; unfortunately, they are not. Some decisions grant deference to state court decisions citing federal law, *see, e.g., Kanikaynar v. Sisneros*, 190 F.3d 1115, 1117-18 (10th Cir. 1999), *cert. denied*, 638 U.S. 1090 (2000), state court decisions lacking analysis and citations to law, *see, e.g., Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 569-70 (10th Cir. 2000). *cert. denied*, 531 U.S. U.S. [sic] 1161 (2001), *abrogated on other grounds* by *McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir. 2001); *Aycox v. Lytle*, 196 F.3d 1174, 1177-78 (10th Cir. 1999), and state court decisions citing only state law, *see, e.g., Revilla v. Gibson*, 283 F.3d 1203, 1212-13 (10th Cir.), *cert. denied*, 2002 WL 3118964 (U.S. Nov. 12) (No. 02-6372) (2002); *Mitchell v. Gibson*, 262 F.3d 1036, 1052-53 (10th Cir. 2001); *Romano,* 239 F.3d at 1164. In contrast, other decisions withhold deference from state court decisions lacking analysis and citations to law, *see, e.g., Smith v. Scott*, 223 F.3d 1191, 1193 n.1 (10th Cir. 2000), and state court decisions citing only state law, *see, e.g., Knighton v. Mullin*, 293 F.3d 1165, 1171 (10th Cir. 2002); *Neill v. Gibson*, 278 F.3d 1044, 1053 (10th Cir. 2001), *cert. denied*, 123 S. Ct. 145 (2002); *Romano*, 239 F.3d at 1166. While resolving this apparent conflict in our decisions may be an appropriate subject for the en banc court, most of our cases can be reconciled under the following approach: We will grant deference to a state court decision under the Antiterrorism and Effective Death Penalty Act unless the decision provides some affirmative indication the state court did not consider the federal claim. *See Aycox*, 196 F.3d at 1177 (granting deference where "[t]here is no evidence here that the state court did not consider and reach the merits of [the] claim"). We have found such affirmative indications in the past where the state court

did not consider the federal claim because of a procedural bar, *see, e.g., Sallahdin v. Gibson*, 275 F.3d 1211, 1234-35 (10th Cir. 2002), where the state court expressly addressed every claim except one, *see, e.g., Duckett v. Mullin*, 306 F.3d 982, 991 n.1 (10th Cir. 2002), and where the state court denied the claim on a state law ground unrelated to the federal issue, *see, e.g., Neill*, 278 F.3d at 1053-54. On the other hand, if a decision lacks such affirmative indications, we will grant it deference under the Act, even if the decision is perfunctory. *See Aycox*, 196 F.3d at 1177-78.

I do not think, however, that a state court decision citing only state law automatically indicates the state court did not adjudicate the federal claim on the merits. Nor do I think our precedent requires such a result. Of course, if a state court decision denies a claim on a state law ground unrelated to the federal issue, deference is not appropriate. *See, e.g., Neill*, 278 F.3d at 1053-54. However, if a state court decision denies a claim on a state law ground rendering the federal claim meritless, or otherwise resulting in its denial, the state court decision lacks any affirmative indication the state court did not consider the federal claim. *See generally, Romano*, 239 F.3d at 1164 (reviewing under § 2254(d) a state court decision citing only state law where the state standard was stricter than the federal standard).

Here, the Oklahoma trial court found nothing in Dr. Garcia's report discussed Mr. Ellis' sanity at the time of the incident. Based on this finding, the court concluded the report was irrelevant. The Oklahoma Court of Criminal Appeals agreed with the trial court's factual finding and conclusion. *See Ellis*, 867 P.2d at 1296-97. Mr. Ellis does not have a due process right to present irrelevant evidence. *See, e.g., Rock v. Arkansas*, 483 U.S. 44, 55

(1987) (discussing a defendant's constitutional right to present relevant testimony); *Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir. 1997) (same), *cert. denied*, 522 U.S. 1122 (1998). Therefore, Mr. Ellis' due process claim has no merit. Since the Oklahoma Court of Criminal Appeals' decision lacks an affirmative indication the court did not consider the federal claim, the decision deserves deference under the Antiterrorism and Effective Death Penalty Act.

Review of the Oklahoma Courts' Factual Determination

The Oklahoma Court of Criminal Appeals' decision denying Mr. Ellis' claim was based on its agreement with the trial court's factual determination that nothing in Dr. Garcia's report discusses Mr. Ellis' sanity at the time of the incident. *Ellis*, 867 P.2d at 1296-97. Mr. Ellis challenges this factual determination, triggering review under §§ 2254(d)(2) and 2254(e)(1) of the Antiterrorism and Effective Death Penalty Act. We may grant Mr. Ellis' habeas petition only if we conclude the factual determination is unreasonable in light of the evidence, presuming the factual determination correct unless Mr. Ellis rebuts the determination with clear and convincing evidence. *See* 28 U.S.C. § 2254(d)(2) & (e)(1). Mr. Ellis did not meet this standard.

The majority disagrees with the Oklahoma court's factual determination that "nothing" in Dr. Garcia's report "was directed to the question of sanity." *Ellis*, 867 P.2d at 1296. (Majority at 13.) The majority overlooks our obligation to presume all state court factual determinations are correct unless the presumption is rebutted with clear and convincing evidence. *See* 28 U.S.C. § 2554(e)(1). This presumption and standard applies regardless of whether

our review is de novo or deferential under § 2254(d). *See Hooks*, 184 F.3d at 1223. Even reviewing the Oklahoma court's factual determination de novo, however, I think the court was correct in finding Dr. Garcia's report is not directed to the question of sanity. Nothing in the report indicates whether Mr. Ellis was capable of knowing right from wrong at the time of the incident. Dr. Garcia's report concludes only that Mr. Ellis was "definitely competent to stand trial." Competency is not the same as sanity. *Compare* Okla. Stat. tit. 21, § 152(4) (2002) *with* Okla. Stat. tit. 22, § 1175.1 (2002).

The majority is concerned certain statements and observations in Dr. Garcia's report may reflect on Mr. Ellis' sanity at the time of the incident. However, these statements offer no conclusions as to sanity and merely repeat what Mr. Ellis himself explained to the doctor, *i.e.*, he did not remember the shootings, he borrowed a gun to kill himself, he heard voices, he was suspicious and paranoid, and he thought demons and spirits were taking over his body. Dr. Garcia's few observations in the report also offer no conclusions as to Mr. Ellis' sanity: Mr. Ellis had a severe dissociative disorder in the past, Mr. Ellis may have been completely depersonalized at the time of the incident, and Mr. Ellis had chronic paranoid type schizophrenia. Nowhere in the report is there a discussion or conclusion as to whether Mr. Ellis knew the wrongfulness of his acts at the time of the incident. The statements and observations in the report merely informed Dr. Garcia's final conclusion: While Mr. Ellis "may have had history of schizophrenic . . . behavior[,] [h]e is definitely competent to stand trial."

The majority also rejects the Oklahoma Court of Criminal Appeals' observation that "[a]ny probative value

[of Dr. Garcia's report] was substantially outweighed by the danger of misleading the jury and confusing the issues of competency and sanity." *See Ellis*, 867 P.2d at 1297. In contrast to the majority, I believe there was a danger the jury would take these statements in Dr. Garcia's report out of the context of competency to support a finding of legal insanity, even though nothing in the report indicates whether Mr. Ellis knew right from wrong at the time of the incident. The report does not explain what it means to have a "dissociative disorder," to have "schizophrenia," or to be "depersonalized." Furthermore, the report does not offer an opinion as to whether Mr. Ellis had any of these conditions at the time of the incident. Even assuming he did, the report does not explain whether these conditions could have or did have an impact on Mr. Ellis' sanity at the time of the incident. In light of the focus of the report and the cursory nature of Dr. Garcia's observations, I do not think the trial court erred in excluding the report.

The *Chambers* analysis

The majority holds the Oklahoma trial court's exclusion of Dr. Garcia's report violated due process under *Chambers v. Mississippi*, 410 U.S. 284 (1973). I cannot agree that the trial court's exclusion in this case is egregious enough to constitute a due process violation.[1] Claims

[1] I also conclude the Oklahoma Court of Criminal Appeals' decision denying Mr. Ellis' due process claim was not contrary to or an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d)(1). Even accepting the majority's conclusion de novo review applies, I cannot agree that the trial court's exclusion of Dr. Garcia's report violated the due process clause.

of error based on evidentiary rulings are matters of state law which are generally not cognizable in federal habeas corpus proceedings, *see Romano*, 239 F.3d at 1166, and ordinarily do not rise to the level of a constitutional violation, *see Crane v. Kentucky*, 476 U.S. 683, 689 (1986). Mr. Ellis may obtain habeas relief for an improper state evidentiary ruling "only if the alleged error was so grossly prejudicial [that it] fatally infected the trial and denied the fundamental fairness that is the essence of due process." *Revilla*, 283 F.3d at 1212 (alteration in original; quotation marks and citation omitted). The category of infractions violating fundamental fairness is very narrow, *see Bullock v. Carver*, 297 F.3d 1036, 1055 (10th Cir.), *cert. filed*, (U.S. Oct. 21) (No. 027110) (2002), and Mr. Ellis' due process claim falls outside this category.

The Supreme Court recognized *Chambers* represented "an exercise in highly case-specific error correction." *Montana v. Egelhoff*, 518 U.S. 37, 52 (1996). The Court explained:

> [T]he holding of *Chambers* – if one can be discerned from such a fact-intensive case – is certainly not that a defendant is denied a fair opportunity to defend against the State's accusations whenever critical evidence favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.

Id. at 53 (quotation marks omitted). *Chambers* and its progeny stand for the limited proposition that a state court's exclusion of highly exculpatory evidence, critical to the defense, necessarily exonerating the defendant if believed, may violate the due process clause. *See Rock*, 483 U.S. at 61-62; *Crane*, 476 U.S. at 690-91; *Green v. Georgia*,

442 U.S. 95, 97 (1979); *Chambers*, 410 U.S. at 302. *See also Washington v. Texas*, 388 U.S. 14, 22-23 (1967); *Richmond*, 122 F.3d at 874. Due process violations have been found when state courts exclude exculpatory, critical, and exonerating evidence by applying rules of evidence mechanistically, *see Green*, 442 U.S. at 97; *Chambers*, 410 U.S. at 302, or arbitrarily, *see Rock*, 483 U.S. at 61-62; *Crane*, 476 U.S. at 690-91; *Washington*, 388 U.S. at 23. No due process violation occurred here.

The statements and observations in Dr. Garcia's report are not highly exculpatory and would not necessarily exonerate Mr. Ellis if believed. *See Richmond*, 122 F.3d at 874 (noting the evidence must be of the type "that if believed would have, by necessity, exculpated the defendant"). Nor would the report, if admitted, create a reasonable doubt as to Mr. Ellis' sanity that did not exist without it. *See id.* At most, the statements and observations show Mr. Ellis may have had some type of mental disability at the time of the incident. They do not indicate whether Mr. Ellis knew right from wrong. As a result, Dr. Garcia's report was not critical to Mr. Ellis' defense of insanity. Although exclusion of the report may have weakened Mr. Ellis' defense somewhat, it did not prevent him from presenting other evidence, including expert testimony, of his alleged mental disability to the jury. That Mr. Ellis chose not to do so does not render an otherwise constitutional exclusion of evidence unconstitutional.

It is also apparent Dr. Garcia's report was not excluded as a result of the state trial court's rigid, mechanistic, or arbitrary application of evidentiary rules. Rather, the trial court determined, after studying the information contained in the report, the report was not relevant to the issue of Mr. Ellis' sanity at the time of the incident. Although

Mr. Ellis does have a due process right to present highly exculpatory evidence critical to his defense, the evidence must be relevant; Mr. Ellis has no due process right to present irrelevant evidence. *See, e.g., Rock*, 483 U.S. at 55; *Richmond*, 122 F.3d at 872. Since the trial court's ruling in no way prevented Mr. Ellis from presenting relevant evidence of his sanity, or lack thereof, no due process violation occurred.

Even if the report was relevant, however, I disagree with the majority's conclusion Dr. Garcia's report was "critical" to Mr. Ellis' defense and created a "reasonable doubt" that did not exist without it.[2] The link between Dr. Garcia's report and Mr. Ellis' sanity is simply too tenuous to support a due process violation under *Chambers*.

For these reasons, I would affirm the district court's denial of habeas relief on Mr. Ellis' due process claim.

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[2] In fact, after seeing Dr. Garcia's report during the sentencing phase, the jurors still sentenced Mr. Ellis to death.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CYRIL WAYNE ELLIS,	)	
Petitioner,	)	**Case No. CIV-97-1386-R**
vs.	)	
RON WARD, Warden, Oklahoma State Penitentiary,	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

(Filed Nov. 27, 2000)

Cyril Wayne Ellis petitions the Court for a writ of habeas corpus pursuant to Title 28 U. S. C. § 2254. The Petitioner is confined in the Oklahoma State Penitentiary in McAlester, Oklahoma pursuant to a judgment and sentence entered in the District Court of Oklahoma County, Case Number CRF-86-651. The Petitioner was convicted on November 5, 1986 of three counts of Murder in the First Degree and four counts of Shooting with Intent to Kill. The jury imposed the death penalty for each of the three murder counts, and terms of imprisonment for each of the four counts of shooting with intent to kill.[1] The jury found three aggravating circumstances for each of the murder charges: 1) that the defendant knowingly created a great risk of death to more than one person; 2) that there existed a probability that the defendant would commit

[1] The Petitioner was sentenced to 2,000 years, 3,000 years, 1,000 years and 1,000 years imprisonment for the shooting with intent to kill counts.

criminal acts of violence that would constitute a continuing threat to society; and 3) that the murder was especially heinous, atrocious, or cruel. The trial court sentenced the Petitioner accordingly on November 12, 1986.

The Petitioner's convictions and sentences were affirmed on direct appeal by the Oklahoma Court of Criminal Appeals on July 24, 1992. The Petitioner's request for rehearing was denied on January 26, 1994. *Ellis v. State of Oklahoma*, 867 P. 2d 1289 (Okla. Crim. App. 1992), *cert. denied*, 513 U. S. 863, 115 S. Ct. 178, 130 L. Ed. 2d 113 (1994) ("*Ellis I*"). The Petitioner filed an application for post-conviction relief in the trial court, which the trial court denied on April 28, 1995. He appealed the denial of post-conviction relief to the Oklahoma Court of Criminal Appeals, and the appellate court affirmed on June 25, 1997.

The Petitioner filed a pleading styled "Preliminary Petition for Writ of Habeas Corpus" on December 19, 1997. On March 11, 1998 the Petitioner filed the Amended Petition for Writ of Habeas Corpus now before the Court, raising the following grounds for relief:

Ground One: The Petitioner was denied effective assistance of counsel at trial in violation of the Sixth, Eighth and Fourteenth Amendments.

(a) Trial counsel were ineffective in that they failed to present crucial evidence in support of the Petitioner's insanity defense;

(b) Trial counsel were ineffective in that they failed to investigate mitigating evidence, and failed to present mitigating evidence in the penalty phase;

(c) Trial counsel were ineffective in that they failed to interview witnesses who were crucial to the State's case;

(d) Trial counsel were ineffective for failing to attack the State's evidence of other crimes; and

(e) Trial counsel were ineffective for failing to determine that a state question regarding pardon and parole was on the ballot before requesting that arrangements be made for the sequestered jury panel to vote.

Ground Two: The Petitioner was deprived of effective assistance of counsel on appeal.

Ground Three: The use of peremptory challenges to exclude minority jurors denied the Petitioner the protections of the Sixth, Eighth, and Fourteenth Amendments.

Ground Four: The Petitioner was deprived of a jury composed of a fair cross-section of the community because persons over the age of seventy

were statutorily excluded from jury service in violation of the Sixth, Eighth and Fourteenth Amendments.

Ground Five: The trial court's failure to allow the Petitioner to individually voir dire prospective jurors as to their views on the death penalty deprived him of a fair trial as guaranteed by the Sixth, Eighth, and Fourteenth Amendments.

Ground Six: The use of a defective insanity instruction violated the Eighth and Fourteenth Amendments.

Ground Seven: The Petitioner was prevented from presenting to the jury a defense of insanity, or a defense based on his inability to form the requisite intent.

Ground Eight: Courtroom theatrics and prosecutorial misconduct denied the Petitioner a reliable trial in violation of the Fifth, Eighth and Fourteenth Amendments.

Ground Nine: The admission of gruesome, irrelevant and prejudicial photographs denied the Petitioner a fair trial under the Eighth and Fourteenth Amendments.

Ground Ten: The trial court erred by failing to give the jury the option of finding the Petitioner guilty of manslaughter, and by failing to

inform the jury of the consequences of a verdict of not guilty by reason of insanity, in violation of the Eighth and Fourteenth Amendments.

Ground Eleven: The trial court's jury instruction on insanity incorrectly placed the burden of persuasion on the Petitioner.

Ground Twelve: Permitting Michael Deloney's testimony denied the Petitioner a fair trial and a reliable determination of his sentence in violation of the Eighth and Fourteenth Amendments.

Ground Thirteen: The trial court's refusal to give the Petitioner's requested jury instruction defining Oklahoma's continuing threat aggravator rendered the aggravator unconstitutional and violative of the Eighth and Fourteenth Amendments.

Ground Fourteen: Relevant evidence concerning parole consideration was not presented to the jury, leaving the jury with inaccurate information for its determination in selecting the appropriate sentences, in violation of the Eighth and Fourteenth Amendments.

Ground Fifteen: The Eighth and Fourteenth Amendments were violated when the jury, was precluded from considering

sidering mitigating evidence dealing with sympathy.

Ground Sixteen: The trial court failed to instruct the jury that it may always return a verdict of life imprisonment regardless of its findings as to aggravating and mitigating circumstances, in violation of the Eighth and Fourteenth Amendments.

Ground Seventeen: The instructions regarding the manner in which the jury was to weigh the aggravating and mitigating circumstances used an unconstitutional burden of proof.

Ground Eighteen: The admission of unadjudicated offenses to support the continuing threat aggravator violated the Eighth and Fourteenth Amendments.

Ground Nineteen: The competency determination in the Petitioner's case was made under an unconstitutional standard in violation of the Sixth, Eighth, and Fourteenth Amendments.

(Amended Petition). The Petitioner has also filed a motion to further amend his petition to add a claim that he is incompetent to be executed.

Summary of the Evidence

The state's evidence at trial established that in the early morning hours of January 30, 1986, the Petitioner

embarked on what may best be described as a shooting rampage, shooting seven people in three different locations in eastern Oklahoma County. Three of the gunshot victims died.

According to the trial testimony, the Petitioner and his fiancee, Cheryl James, had an argument several days before the shooting, on January 26, 1986. During the argument, the Petitioner struck Ms. James. Later that day, the Petitioner expressed remorse for hitting Ms. James, and took pills in her presence in an apparent suicide attempt. Ms. James then drove the Petitioner to Presbyterian Hospital in Oklahoma City where he was hospitalized for a few days. The Petitioner was transferred to the psychiatric ward of St. Anthony's Hospital in Oklahoma City on January 29, 1986. That same day, Ms. James went to visit the Petitioner at the hospital, and left after about two hours. When Ms. James got to her car, the Petitioner came running behind her and forced her to take him with her. Ms. James then tried to escape from the Petitioner, and managed to get help from a security guard at a hotel in downtown Oklahoma City, a short distance from the hospital. Ms. James told the guard that the Petitioner was "acting crazy," and that he had just left a hospital mental ward. Police were summoned to the hotel, but did not arrest the Petitioner.

Later in the evening hours of January 29, 1986, the Petitioner attempted to purchase a handgun from a retail sporting goods store. The Petitioner did not have enough money to pay for the gun, but the Petitioner was able to persuade one of the store clerks to loan him one of the

clerk's own guns.[2] The Petitioner purchased some ammunition for the gun and left the store. Later, the Petitioner went to the store clerk's apartment and picked up the borrowed gun.

Early the next morning, the Petitioner drove around eastern Oklahoma City in his car, looking for Cheryl James. He found Ms. James riding in a car with Robert Dumas, her sister's boyfriend. The Petitioner drove up beside Mr. Dumas' car and spoke with Ms. James through the car windows. When Mr. Dumas tried to drive away, the appellant chased Mr. Dumas' car, shooting at it. Mr. Dumas drove his car into a nearby yard seeking help, and the Petitioner blocked Mr. Dumas' car. Ms. James got out of Mr. Dumas' car and fled on foot. The Petitioner pointed the gun at Mr. Dumas, and forced him to get into the trunk of Mr. Dumas' car. When Mr. Dumas began beating on the trunk lid for help, the Petitioner opened the trunk and said: "I see you don't want to live." The Petitioner then shot Mr. Dumas twice and closed the trunk lid. Mr. Dumas survived.

The Petitioner then drove to the home where Mr. Dumas lived with Teresa Thomas, Cheryl James' sister. Cheryl James and her mother had spent the night at the Dumas/Thomas home. When the Petitioner arrived at the house, only Ms. Thomas and her six-year-old daughter, Tameca, were at home. The Petitioner used the gun to knock out a front window, entered the house, and shot Teresa Thomas. Blood splatter evidence indicated that the

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[2] The Petitioner falsely told the store clerks that he operated a restaurant, and needed a gun for protection. *Ellis I*, 867 P. 2d at 1293.

Petitioner followed Ms. Thomas through the house as she attempted to flee out the back door, shooting her several more times as she staggered, then crawled, then fell to the ground in her back yard, The Petitioner then shot young Tameca Thomas three times. Teresa Thomas died of her wounds. Tameca Thomas was critically injured, but survived.

The Petitioner returned to his apartment to retrieve more ammunition, then proceeded to his place of employment, the offices of Consolidated Freightways. When the Petitioner encountered Gordon Moore in the parking lot, he ordered him to kneel down between two cars, then shot Mr. Moore in the face. Mr. Moore pretended to be dead until the Petitioner left the vicinity, and survived his injuries.

The Petitioner then entered the Consolidated Freightways building and shot Carl Lake. After he was shot, Mr. Lake crossed the room, grabbed a box, and slumped to the floor. The Petitioner fired a second shot into the top of Mr. Lake's head, killing him. After leaving Mr. Lake's office, the Petitioner fired at James Rider from the top of a loading dock. When Mr. Rider fell to the ground, the Petitioner shot Mr. Rider again, killing him. On his way out of the building, the Petitioner opened fire in the parking lot where several people were gathered. The Petitioner stopped and reloaded the gun at least once, firing numerous shots. Ancil Davis was hit but survived. The Petitioner also spoke and interacted with several other people at various times during the incident at Consolidated Freightways whom he did not shoot or attempt to shoot.

Retroactivity of the Antiterrorism and Effective Death Penalty Act

As an initial matter, the Court addresses the Petitioner's argument that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") may not be applied "retroactively" to his case. The Petitioner recites that he presented his case in state court in accordance with the requirements of the federal habeas corpus standards in effect at the time the alleged Constitutional violations arose, and argues that application of the AEDPA to his current Petition would "alter fundamentally the established course of review."

This issue has been resolved by *Williams v. Taylor*, ___ U.S. ___, 120 S. Ct. 1495, 1517, 146 L. Ed. 2d 389 (2000). In that case, the Supreme Court rejected a habeas corpus petitioner's attempt to apply the pre-1996 version of the habeas corpus statute. Because Williams had filed his petition in December 1997, the case was governed by the statute as amended by AEDPA. Similarly, because the Petitioner commenced this case after the effective date of the AEPDA, his case is governed thereby.

When reviewing the merits of a claim already decided by the state courts, the AEDPA requires this Court to deny relief unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." Title 28 U. S. C. § 2254 (d). The Supreme Court has noted that this statutory text "does not obviously prescribe a specific, recognizable standard of review for dealing with either phrase." *Williams*, 120 S. Ct. at

1508. Significantly, it does not use any term, such as "de novo" or "plain error" that would easily identify a familiar standard of review. *Id. See also Ramdass v. Angelone*, ___ U. S. ___, 120 S. Ct. 2113, 2119, 147 L. Ed. 2d 125 (2000). Nevertheless, the Court observed that: "[I]t seems clear that Congress intended federal court judges to attend with the utmost care to state court decisions, including all of the reasons supporting their decisions, before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant issuance of the writ." *Id.* Quite simply, the AEDPA increases the deference to be paid by the federal courts to the state court's factual findings and legal determinations. *Williams*, 129 S. Ct. at 1509; *Houchin v. Zafaras*, 107 F. 3d 1465, 1470 (10th Cir. 1997).

Ground One:

Ineffective Assistance of Trial Counsel

The Petitioner's first ground for relief is that his trial attorneys were ineffective in the presentation of his defense in several respects. Among other things, the Petitioner complains that his trial attorneys failed to present evidence pertaining to a psychological evaluation performed three weeks prior to the shootings, failed to investigate and present potentially mitigating evidence of his troubled youth and childhood, failed to interview witnesses, failed to challenge the state's evidence of other crimes, and requested that jurors be permitted to vote in the general election before determining that the ballot included a state question pertaining to pardon and parole.

The standard for judging claims of ineffective assistance of counsel was established in *Strickland v. Washington*, 466

U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland's* two-prong test, a habeas corpus petitioner must first overcome the strong presumption that counsel's conduct falls within the "wide range of reasonable professional assistance." 466 U. S. at 689-690. Second, the petitioner must show that this deficient performance actually prejudiced the defense, meaning "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694.[3] The petitioner bears the burden of demonstrating how he or she was actually prejudiced by counsel's representation. *United States v. Andrews*, 790 F. 2d 803, 815 (10th Cir. 1986), *cert. denied*, 481 U. S. 1018, 107 S. Ct. 1898, 95 L. Ed. 2d 505 (1987). The benchmark for judging an ineffective assistance claim under the two-part *Strickland* test is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Williams v. Taylor*, ___ U. S. ___ 120 S. Ct. 1495, 1510-1511, 146 L. Ed. 2d 389 (2000); *United States v. Rivera*, 900 F. 2d 1462 (10th Cir. 1990). In the context of a challenge to counsel's effectiveness in the penalty phase of a capital trial, the "prejudice" element is established if the petitioner demonstrates a reasonable probability that, absent counsel's errors, the sentencer

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[3] A defendant's constitutionally guaranteed right to the effective assistance of counsel was "clearly established" at the time the Petitioner's state court convictions became final. Therefore, the Petitioner is entitled to habeas corpus relief on this ground under the AEDPA if his trial lawyers' failure to render effective representation was either "contrary to, or involved an unreasonable application of," those established Constitutional principles. *Williams*, 120 S. Ct. at 1511.

would have concluded that the balance of aggravating and mitigating circumstances did not warrant the penalty of death. *Brewer v. Reynolds*, 51 F. 3d 1519, 1523 (10th Cir. 1995), *cert. denied*, 516 U. S. 1123, 116 S. Ct. 936, 133 L. Ed. 2d 862 (1996); *Davis v. Executive Director of Department of Corrections*, 100 F. 3d 750 (10th Cir. 1996), *cert. denied*, 520 U. S. 1215, 117 S. Ct. 1703, 137 L. Ed. 828 (1997).

A. Failure to Present Evidence of Psychological Testing.

The Petitioner contends that he underwent a psychological examination, as part of a worker's compensation claim, approximately three weeks before the crimes occurred. The Petitioner claims that the Minnesota Multiphasic Personality Inventory ("MMPI") test administered to him on January 7, 1986 indicated that he suffered from schizophrenia, and that his trial attorneys' failure to discover and present this evidence rendered their performance ineffective.

On direct appeal, the Oklahoma Court of Criminal Appeals considered this issue in connection with the Petitioner's motion for new trial based on newly discovered evidence. The court noted that the MMPI test was administered in conjunction with a worker's compensation claim the Petitioner had filed as a result of a foot injury. *Ellis I*, 867 P. 2d at 1303. The court declined to grant relief based on this evidence, finding that the MMPI test results could have been discovered by trial counsel prior to trial in the exercise of due diligence, and further finding "beyond a reasonable doubt" that this evidence would not have changed the outcome of the trial. *Ellis v. State of Oklahoma*, 867

P. 2d 1289, 1303 (Okla. Crim. App, 1992), *cert. denied*, 513 U. S. 863, 115 S. Ct. 178, 130 L. Ed. 2d 113 (1994).

It appears from the record that the Petitioner failed to inform his trial attorneys that he had undergone the psychological testing in question. The Court of Criminal Appeals rejected appellate counsel's suggestion that the Petitioner may have been incompetent to remember having taken the test. *Id.* This Court agrees that nothing in the record indicates that the Petitioner suffered from any degree of delusion, confusion or lapse of memory at any point during his trial proceedings. The Petitioner cannot fault his trial counsel for failing to offer evidence of this psychological testing when he never made counsel aware that the tests had been administered. Clairvoyance is not required of effective trial counsel. *Dooley v. Petsock,* 816 F. 2d 885, 890-891 (3rd Cir. 1987), *cert. denied*, 484 U. S. 863, 108 S. Ct. 182, 98 L. Ed. 2d 135 (1987); *United States v. Miller,* 907 F. 2d 994 (10th Cir. 1990); *Allen v. Oklahoma,* 871 P. 2d 79, 99 (Okla. Crim. App. 1994), *cert. denied*, 513 U. S. 952, 115 S. Ct. 370, 130 L. Ed. 2d 322 (1994); *Jackson v. Scully,* 781 F. 2d 291 (2nd Cir. 1986). Furthermore, the record demonstrates that the Petitioner's trial counsel presented other evidence in an attempt to show that he suffered from psychological or neurological impairments.[4] Thus, the Petitioner has not

[4] For example, the Petitioner's trial attorneys offered evidence that, in the weeks prior to the shootings, the Petitioner had suffered a head injury when he was struck in the head with some boxes two or three weeks before the shootings. Counsel offered testimony that the Petitioner was found "passed out" in the bathroom some time after the boxes fell on him. (Tr., Vol. III, pp. 154, 184-185, 197, 203; Tr., Vol. IV, pp. 153-154). Defense counsel offered testimony that several days after

(Continued on following page)

made the requisite showing that his trial attorneys' performance fell outside the "wide range of reasonable professional assistance" by virtue of their failure to discover and offer evidence of the MMPI testing.[5]

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the head injury the Petitioner may have suffered a seizure, and that a few days prior to the shootings, the Petitioner took an overdose of pills in a failed suicide attempt. (Tr., Vol. IV, pp. 153-162). Counsel also elicited testimony concerning the Petitioner's hospitalization in a psychiatric ward, and his abrupt departure from the hospital without medical authorization the evening before the shootings. (Tr., Vol. IV, pp. 179-182). Counsel called one of the Petitioner's sisters to testify that he was particularly upset the night before the shootings. (Tr., Vol. IV, p. 164). Counsel offered testimony from several witnesses that the Petitioner said strange things, and claimed to be hearing voices in the weeks prior to the murders. In the second stage of trial, defense counsel presented testimony from Willie Williams, a minister of the Petitioner's church, who testified that on several occasions prior to the shooting incident, the Petitioner talked to him about hearing voices. (Tr., Vol. V, pp. 98). Defense counsel presented testimony from Reverend Alvin Faine, pastor of the Petitioner's church, who testified that the Petitioner "has a condition," and that the Petitioner was always telling him that he needed help. Reverend Faine testified that the Petitioner threatened suicide, and that he prayed with and tried to reason with the Petitioner. (Tr., Vol. V, pp. 104-106). Reverend Faine's wife, Grace E. Faine, testified that the Petitioner had some "deep emotional problems," and that she heard the Petitioner discussing his mental problems. Mrs. Faine testified that the last time the Petitioner came to church before the killings, he stood up in church and wept, and said: "This thing that's in my mind is trying to get me to destroy myself . . . I need help. I need you all to help me." (Tr., Vol. V, p. 107-109).

[5] This case contrasts with *Williams v. Taylor*, ___ U. S. ___, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), in which the Supreme Court found that the Petitioner was denied effective assistance of counsel when his attorneys failed to investigate and present mitigating evidence of childhood hardships during the sentencing phase of a capital trial. In *Williams*, the omitted evidence included the fact that the petitioner's parents had been imprisoned for criminally neglecting him and his siblings, as well as extensive court records graphically documenting the horrific condition of the home. Trial counsel in

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Moreover, as the state court explained, the Petitioner has not demonstrated a substantial likelihood that the MMPI test results would have changed the outcome of either the guilt phase or the sentencing phase of his trial. *See Ellis v. State*, 867 P. 2d 1289 at 1303. The Petitioner has not offered the MMPI test results into evidence, either here or in his post-conviction proceedings. Instead, the Petitioner points to a summary of the test results contained in two psychological reports authored by Philip J. Murphy, Ph. D., which were offered into evidence in his post-conviction proceedings. Dr. Murphy's description of the MMPI results is not entirely favorable to the Petitioner.[6] Reasonable jurors could well have found this evidence to weigh in favor of the continuing threat aggravator. Thus,

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Williams also omitted evidence that he was severely and repeatedly beaten by his father, that he had been committed to the custody of he [sic] state social services bureau for two years during his parents' incarceration, including one stay in an abusive foster home. 120 S. Ct. at 1514. Counsel also failed to offer evidence that Williams had been diagnosed "borderline mentally retarded," and that he did not advance beyond the sixth grade in school. *Id.* In *Williams*, counsel also failed to offer other available mitigating evidence, including evidence that he had been commended for helping to crack a prison drug ring and for returning a guard's missing wallet; as well as evidence that Williams had participated in a prison ministry program and had earned a carpentry degree while in prison. *Id.* The Supreme Court noted that Williams' attorneys had failed to discover this evidence not because of any strategic calculation, but because they incorrectly thought that state law barred access to such records. *Id.*

[6] According to Dr. Murphy's 1990 psychological report, the 1986 MMPI "provides a profile of schizophrenia of a paranoid, simple or chronic undifferentiated type." However, Dr. Murphy also reported that the Petitioner's MMPI test "shows a lessening of features of his personality which would inhibit violent tendencies . . ." and that over the years his ability to control his "violent emotions" had markedly deteriorated.

the Court concludes that the Petitioner has not shown that he was prejudiced by the failure to offer the MMPI test results. *See Strickland v. Washington,* 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Accord, United States v. Andrews,* 790 F. 2d 803, 815 (10th Cir. 1986), *cert. denied,* 481 U. S. 1018, 107 S. Ct. 1898, 95 L. Ed. 2d 505 (1987).

B. Failure to Investigate and Present Mitigating Evidence of "Turbulent Life History"

The Petitioner next asserts that his trial attorneys rendered ineffective assistance in the second phase of his trial because they failed to interview his family members and friends who could have testified about his struggles as a child, as well as his difficulties in his early adult years, and thus failed to present important mitigating evidence.

In his Amended Petition, the Petitioner alleges that during his childhood his parents had an unhappy marriage,[7] that he had inadequate parental supervision, and was abused by his father. The Petitioner also describes

[7] The Petitioner contends that as a young child, he would sometimes try to break up fights between his parents, and that he was sometimes injured in the process. The Amended Petition alleges that the Petitioner's mother slept with a hammer under her pillow, and would tell her husband that he'd better sleep with one eye open. The Petitioner further alleges that Mrs. Ellis "continually" threatened to kill her husband in front of the children. The Petitioner describes one incident in which his mother threw a pot of boiling water onto the bed where he and his father were sleeping. The father was burned, but he pushed the Petitioner out of harm's way. The mother then ran after the Petitioner's father with a pair of scissors, and he jumped out of a bathroom window to escape. (Amended Petition, p. 5, citing P. C. 155).

several specific instances of trauma during his childhood, including being struck by a car and badly injured at the age of six,[8] the death of his grandfather when he was ten, and being teased as a child for being overweight. The Petitioner also alleges that he was sexually molested by a neighbor on multiple occasions when he was eleven years old.[9] (Amended Petition, p. 5).

The Amended Petition alleges that the Petitioner began experiencing strange physical symptoms when he was in the eighth grade, including difficulty moving his limbs, difficulty speaking and frequent, severe headaches, which caused his parents to believe he was using drugs. (Amended Petition, p. 5). The Petitioner alleges that at some point during his youth he began hearing "voice commands" which told him to do irrational things. The Petitioner claims that sometimes the voices "overpowered" him, and that he "found himself doing things he did not want to do." (Amended Petition, p. 6). The Petitioner alleges that during this time he began "getting in trouble with the law," and had to appear in juvenile court. (Amended Petition, p. 6). He also got in trouble at school for fighting, and was once expelled from a school for fighting with a girl. The Petitioner also contends that he was greatly upset by his parents' separation, leading to a

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[8] According to the Amended Petition, the first car struck the Petitioner and knocked into the path of the second car, which dragged him across the pavement for six or seven feet. The Petitioner suffered a skull fracture and contusions of the brain, and remained unconscious for several days. (Amended Petition, p. 5).

[9] The Petitioner alleges that the neighbor even invited friends over to molest him as well. Amended Petition, p. 5.

physical altercation with his father.[10] Despite these childhood difficulties, the Petitioner graduated from high school with honors, and took college courses both in Tennessee and in Oklahoma. (Amended Petition, p. 7).

The Petitioner also claims to have suffered various difficulties during his adult years. The Petitioner contends that as an adult be suffered from depression, heard "voices," and had trouble with a series of jobs. (Amended Petition, pp. 8-9). The Petitioner alleges, without elaboration, that he "used women for sex" as early as age fifteen or sixteen. More specifically, the Petitioner describes an incident during his adult years in which he "forced" a woman he had been dating to have sex with him "against her will," and began to choke her before he "realized what he was doing."[11] (Amended Petition, p. 9). The Petitioner argues that this information "would have enabled the sentencer to understand the mental illness" from which he suffered. (Amended Petition, p. 20).

Initially, the Court observes that each of these asserted incidents and hardships was clearly within the Petitioner's own personal knowledge at the time of his

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[10] The Amended Petition alleges that when he told his father how upset he was over the divorce, his father punched him in the face with a closed fist, cutting his mouth and knocking some teeth loose. The Petitioner and his mother sought protective order against his father, who then threatened to kill the Petitioner. (Amended Petition, pp. 6-7). The same paragraph alleges that the Petitioner's mother "always told him he was no good, just like his father". (Amended Petition, p. 7).

[11] The Petitioner's reason for including the account of this incident in his Amended Petition is not clear to the Court. The Court can conceive of no circumstances under which evidence that the Petitioner had raped and choked a woman could be considered mitigating.

trial.[12] Indeed, the Petitioner may be the only person who knew of some of these incidents at the time of trial. The Petitioner has not shown that he ever conveyed any of this information to either of his trial lawyers during the course of the trial proceedings. Again, the Petitioner cannot fault his trial counsel for failing to raise claims as to which he neglected to supply the essential underlying facts. *Dooley v. Petsock*, 816 F. 2d 885, 890-891 (3rd Cir.), *cert. denied*, 484 U. S. 863, 108 S. Ct. 182, 98 L. Ed. 2d 135 (1987); *United States v. Miller*, 907 F. 2d 994 (10th Cir. 1990); *Allen v. Oklahoma*, 871 P. 2d 79, 99 (Okla. Crim. App.), *cert. denied*, 513 U. S. 952, 115 S. Ct. 370, 130 L. Ed. 2d 322 (1994); *Jackson v. Scully*, 781 F. 2d 291 (2nd Cir. 1986). There is no evidence to support the Petitioner's suggestion that he was incapable of conveying this information to his lawyers. The evidence does not suggest that the Petitioner suffered from such a degree of mental illness or confusion as to prevent him from informing his trial lawyer of his life history. The Petitioner cannot blame his trial lawyers for his own failure to inform them of the various troubles and misfortunes he now points to as mitigating circumstances, especially where many of the incidents he complains of would have been beyond the scope of any reasonable investigation. Counsel may only be held responsible for their own derelictions. *Miller*, 907 F. 2d at 998, 999.

Despite the Petitioner's current criticism of his attorneys' performance at trial, it does not appear to the Court

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[12] The Petitioner, presumably, would have known of any childhood physical or sexual abuse or neglect, as well as any illness, injury or trauma he suffered during his youth or [sic] an adult.

that counsel's pretrial investigation, or their presentation of mitigating evidence, were rendered unreasonable by virtue of their failure to discover and present evidence of the hardships the Petitioner faced during his childhood and youth. The record demonstrates that the Petitioner's trial lawyers presented numerous witnesses to give mitigating testimony, and in some instances, elicited mitigating testimony from the state's witnesses on cross-examination. It is apparent from the record that Mr. Evans and Mr. Toure followed a reasonable plan or trial strategy in presenting the mitigating evidence.[13] *See*

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[13] In the first phase of trial, defense counsel questioned various witnesses about the Petitioner's head injury, his apparent suicide attempt, his hospitalization just prior to the crimes, and his emotional state in the weeks prior to the crimes. Defense counsel questioned Cheryl James about the breakup of their relationship in the days before the shootings, and the Petitioner's behavior and emotional state the evening before the shootings. In the second phase, defense counsel called the Petitioner's brother and sisters, who testified that they loved the Petitioner, and that they would visit with him in prison if he were sentenced to life imprisonment. (Tr. Vol. V, pp. 85-89). Defense counsel called one of the Petitioner's former college instructors, who testified that the Petitioner was "a very special student," that he made "A's" on his tests, and that he was "interested in all of his school work." (Tr. Vol. V, pp. 89-90). Two ministers from the Petitioner's church congregation testified as to the Petitioner's volunteer efforts with the youth of his church. Both ministers further testified concerning their friendship with the Petitioner, and that they would visit him and communicate with him if he were sentenced to life imprisonment. (Tr. Vol. V, pp. 95-98, 104-106). Two probation officers for the Oklahoma County Juvenile Bureau testified as to the Petitioner's work as an unpaid volunteer mentoring children. (Vol. V, pp. 99-100, 102-104). The wife of one of the ministers testified that she considered the Petitioner to be a "warm, loving, considerate" individual, but that he had some "deep emotional problems." This witness testified that she heard the Petitioner stand and weep in church, and has heard him tell the congregation that be had some problems in his mind, including voices telling him to kill

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Dutton v. Brown, 812 F. 2d 593, 598 (10th Cir. 1986) (Fact that a defense attorney could have done more investigation into a defendant's background for mitigating evidence does not, standing alone, establish ineffective assistance of counsel; an attorney's duty to conduct an investigation into potential mitigating evidence is "not boundless"), *cert. denied, Dutton v. Maynard*, 484 U. S. 836, 108 S. Ct. 116, 98 L. Ed. 2d 74 (1987); *Brecheen v. Reynolds*, 41 F. 3d 1343, 1366-1368 (10th Cir. 1994), *cert. denied,* 515 U. S. 1135, 115 S. Ct. 2564, 132 L. Ed. 2d 817 (1995) (An attorney has no absolute duty to present mitigating evidence and is not required to investigate all leads, as long as the decision to pursue a particular lead, or to pursue a particular lead only so far, is reasonable under the circumstances).

Further, even if trial counsel's inquiry into the Petitioner's childhood and youth and presentation of evidence in that regard could be considered unreasonable under the circumstances, the Petitioner has not met the essential "prejudice" element of an ineffective assistance claim. Most of the childhood hardships the Petitioner now asserts as mitigating factors are not so extreme or severe as to be of value as mitigating evidence. Moreover, the adversities the Petitioner allegedly faced as a child are remote in time and unconnected to the crimes for which he was sentenced, and thus are of doubtful value as mitigating circumstances. On numerous occasions, the Tenth Circuit has determined that evidence of a troubled childhood does

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himself. (Tr. Vol. V, pp. 107-109). Finally, a woman testified that after she crashed her automobile into a creek in August 1984, the Petitioner and some other men saved her from drowning. (Tr. Vol. V, pp. 111-112).

not outweigh evidence supporting the conviction and evidence supporting aggravating circumstances. *See, e. g., Plantz v. Massie,* 216 F. 3d 1088 (10th Cir. 2000); *Foster v. Ward,* 182 F. 3d 1177, 1189 (10th Cir. 1999), *cert. denied,* ___ U. S. ___, 120 S. Ct. 1438, 146 L. Ed. 2d 326 (2000). The Petitioner's case is not an exception. *Cf. Williams v. Taylor,* 120 S. Ct. 1495 at 1514-1516, 146 L. Ed. 2d 389 (2000) (discussing mitigating evidence which was prejudicial). In light of the nature of the Petitioner's crimes and the strength of the State's case at both stages of trial, it is not reasonably probable that the additional mitigating evidence the Petitioner now points to would have affected the outcome at the sentencing stage. *See Clayton v. Gibson,* 199 F. 3d 1162, 1179 (10th Cir. 1999), *cert. denied,* 2000 WL 697188 (October 2, 2000).

Most of the incidents which allegedly occurred during the Petitioner's adult years are, at most, of only dubious value as mitigating evidence. In the penalty phase of a capital trial involving multiple murders, defense counsel can hardly be criticized for failing to stress their client's violent past, his "use" of women for sex, and his difficulty holding a job. Assuming that trial counsel knew that the Petitioner had once raped and choked a woman, it was obviously reasonable trial strategy to omit this evidence in the presentation of the Petitioner's case.[14]

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[14] The Oklahoma Court of Criminal Appeals noted in its opinion on direct appeal, the Petitioner's trial counsel offered testimony that:

- The Petitioner's brother and sisters love him, and they would visit him and communicate with him in the penitentiary if he were sentenced to life imprisonment;

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Moreover, an examination of the record indicates that the Petitioner's trial attorneys presented numerous forms of mitigating evidence on his behalf in the penalty phase of his trial. Under the circumstances, the Court finds no reasonable probability that the additional evidence urged by the Petitioner as mitigating would have led to a different result. *Cf., Williams v. Taylor*, 120 S. Ct. at 1514-1516.

- The Petitioner's friends, ministers, fellow church members and former teacher cared for him and were concerned for his welfare;
- The Petitioner was a very active member of the Garden of Prayer Church in God, and was the Assistant Sunday School Superintendent and a youth minister;
- The Petitioner once helped rescue a young woman whose car had slid into a flooded creek;
- The Petitioner had been a volunteer at the Oklahoma County Juvenile Bureau, and had spent time working with troubled children;
- The Petitioner had a history of mental illness, which he had discussed with his ministers and fellow church members;
- Just prior to the commission of his crimes, the Petitioner had attempted to commit suicide by taking an overdose of pills. Afterwards he was admitted to the psychiatric ward of St. Anthony's Hospital;
- At the time of the Petitioner's crimes, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired by mental illness;
- The Petitioner had no prior felony convictions; and
- The Petitioner showed remorse for the shootings when he was questioned by Detective Sellers.

867 P. 2d 1289, 1307. The Oklahoma Court of Criminal Appeals noted that this was "not necessarily an all encompassing list of the mitigating evidence" presented at trial and/or considered by the appellate court in reweighing. "Rather, the list merely highlights the majority of the evidence offered in mitigation." 867 P. 2d at 1307.

The Petitioner's claim that his trial lawyers failed to offer evidence that he had been "hearing voices" and that he was upset the night before the shootings is likewise flawed. The Petitioner's attorneys did, in fact, offer evidence in support of his claim that he had been hearing voices in the weeks before the shootings,[15] and offered other evidence tending to show that the Petitioner suffered from, and had been treated for, some form of emotional distress just prior to the murders. Witnesses testified that the Petitioner had been particularly agitated the night before the shootings.[16] It was within the jury's province to

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[15] Defense counsel asked the Petitioner's sister, Diana Jones, whether the Petitioner told her he had been hearing voices. The trial court sustained the state's objection to this testimony. (Tr. Vol. IV, p. 156). Defense counsel made an offer of proof that she would have testified that he said he was hearing voices, and they are telling him to kill himself. Cheryl James testified that the Petitioner had never said anything to her at any time in their relationship about hearing voices. (Tr. Vol. IV, p. 200). Defense counsel also attempted to offer into evidence the discharge summary from the Petitioner's pre-trial evaluation at Eastern State Hospital, which states that the Petitioner said he had been hearing voices. The trial court disallowed this testimony on the ground of hearsay. (Tr., Vol. IV, p. 258). Minister Willie Williams testified that the Petitioner talked to him on several occasions about hearing voices. (Tr., Vol. V, p. 98). Grace E. Faine testified that at different times, she had heard of the Petitioner saying that he had "problems in his mind" with voices telling him to kill himself. (Tr., Vol. V, pp. 108-109).

[16] The Petitioner's sister, Diana Jones, described the Petitioner's encounter with police officers and his emotional state the night before the shootings. Ms. Jones testified that the night before the shootings the Petitioner acted "lost, like star gazing," that he appeared dazed, that he was motionless, and that "it was like he wasn't there." (Tr., Vol. IV, pp. 153-162). Defense counsel also presented testimony from Cheryl James, who had been engaged to marry the Petitioner, concerning their break-up, and their encounter the evening before the shootings. (Tr., Vol. IV, pp. 170-178, 188-189). Ms. James testified at length concerning

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determine the credibility and weight of this evidence, and the Petitioner has not shown that his attorneys' performance was unconstitutionally deficient in regard to its presentation. *Strickland, supra.*

C. Failure to Interview Witnesses.

The Petitioner complains, in the broadest terms, that his trial counsel failed to interview witnesses. The Petitioner has not identified anyone his lawyers failed to interview, or explained how such individuals would have helped his defense. The Petitioner has not made a substantial showing that, but for counsel's failure to interview any particular witness, there is a reasonable probability that the outcome of his trial would have been different. *Kramer v. Kemna*, 21 F. 3d 305 (8th Cir. 1994). Accordingly, the Petitioner has not shown that his trial lawyers acted unprofessionally in this regard, or that he was prejudiced thereby.

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the Petitioner's emotional outburst in a downtown Oklahoma City hotel on the evening of January 29, 1986. (Tr., Vol. IV, 182-185). The security manager of the hotel likewise testified concerning the Petitioner's outburst and altercation with Ms. James and various hotel employees. (Tr., Vol. IV, 201-205). The hotel security manager testified that Ms. James told him that the Petitioner had "just got[ten] out of the mental ward" and that he was "crazy." (Tr., Vol. IV, p. 203). Defense attorneys presented testimony from police officer Henry Jack Suellentrop concerning the Petitioner's emotional behavior at his apartment after leaving the hotel. (Tr., Vol. IV, 214-215).

D. Failure to Attack Evidence of Other Crimes.

The Petitioner asserts that his trial attorneys failed to attack the state's evidence of unadjudicated crimes offered in the second stage of trial to support the aggravating circumstance of continuing threat to society. The Petitioner contends that his trial counsel failed to adequately investigate such unadjudicated crimes, and was unprepared to meet the state's evidence.

Contrary to the Petitioner's assertion, his trial counsel cross-examined the state's witnesses fairly extensively regarding his other crimes. The state's "other crimes" evidence at trial consisted of the testimony of a former co-worker who testified that the Petitioner once assaulted him with a closed fist and then with a two-by-four, and the testimony of a former girlfriend that the Petitioner had assaulted her when she tried to break up with him. Defense counsel cross-examined each of these witnesses at some length. See, e. g., Tr. Vol. V, pp. 64-66, pp. 74-75.

Even with the benefit of hindsight, the Petitioner offers no suggestion as to what more his trial attorneys might have done to challenge the testimony of these witnesses, or what might have been gained from further questioning or investigation of these witnesses. *See Strickland v. Washington*, 466 U. S. 668, 690-692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Judicial scrutiny of the adequacy of attorney performance must be highly deferential. The Court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *United States v. Blackwell*, 127 F.3d 947, 955 (10th Cir. 1997). In keeping with this standard, the Court finds that the Petitioner has failed to show either that his trial attorneys' response to the

evidence of other crimes was so inadequate as to render their performance unreasonable, or that he was prejudiced thereby.

E. Failure to Determine State Question on Ballot.

The Petitioner next contends that this trial attorneys were ineffective in the second stage of trial because they requested that the sequestered jurors be allowed to vote in the state-wide general election, without first determining that the ballot included a state question dealing with life imprisonment without the possibility of parole. The record indicates that during the punishment phase of trial on November 4, 1986, attorneys for the state and for the defense repeatedly asked the trial judge to make arrangements for the jurors to vote.[17] Approximately forty-five minutes before the polls closed, the trial judge prepared an order directing election officials to allow the jurors to vote at the offices of the Oklahoma County Election Board without breaking sequestration. (Tr. Vol. V, pp. 179-181). The jurors were escorted to the election board offices and allowed to vote. (Tr. Vol. V, p. 181). *After* the jurors had voted, and after the polls had closed, defense counsel for the first time expressed "concern" that the jurors "may have been influenced to some extent" by the presence of State Question 593 on the ballot.[18] Defense

[17] Tr. Vol. V, pp. 181, 184.

[18] "According to the Petitioner's briefs, State Question 593 read, in pertinent part:

> "This measure would amend Section 10 Article 6 of the State Constitution. This Section deals with reprieves, commutations, pardons and paroles. It would take away the power of the Pardon and

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counsel moved for a mistrial, or, in lieu thereof, an instruction informing the jury that "the term of life imprisonment means life."

The 1986 state-wide general election fell during the Petitioner's trial, and it appears from the record that allowing the jurors to vote had been the subject of much discussion all afternoon on election day. (Tr. Vol. V, p. 184). The prosecuting attorney and the trial judge observed, on the record, that State Question 593 had been widely publicized,[19] and that it had been defense counsel's idea to

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Parole Board and the Governor to grant paroles to convicts sentenced to death or to life in prison without parole. This means a person sentenced to life without parole or to death could not get out on parole. It would still give the Pardon and Parole Board the power to recommend parole for other convicts. The Governor could still grant pardons, commutations and reprieves in all cases. He could also grant parole to other convicts.

SHALL THIS AMENDMENT BE APPROVED BY THE PEOPLE?"

(Amended Petition, p.25; Petitioner's post-conviction brief, p. 31.)

[19] District Attorney Robert Macy remarked: "For the record, Your Honor, I would . . . state that for weeks, maybe even months, there has been publicity concerning this issue being on the ballot. I'm quite certain that everyone in the courtroom, including all the jurors, have read in the newspaper, have heard on TV, that this issue would be on the ballot. So there would be nothing new that they would see today that they haven't already been exposed to for weeks prior to this trial." The judge responded: "I think you are right. I've explained this to counsel in chambers when we were – I thought they were in jest when, Mr. Opio Toure, when you first made this motion; it's so frivolous. This issue has been on television, on radio and newspapers, everything else, about life without parole. . . . And it seems to me that you are grabbing at straws, to try to do anything to disrupt this trial, and to try to create error, and you are dreaming up these things." (Tr. Vol. V, pp. 185-186). The trial judge then pointed out that it had been the idea of defense counsel, Mr. Evans, to allow the jurors to vote in the offices of

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allow the jurors to vote. In a hearing outside the presence of the jury, the trial judge accused defense counsel of "grabbing at straws," of trying to disrupt the trial, and of "dreaming up these things." The trial judge expressed some frustration with defense counsel's abrupt change of position after the jury had been allowed to vote. Voicing his opinion that defense counsel's change of position amounted to "unethical conduct," the trial court denied defense counsel's motions. (Tr. Vol. V, pp. 186-187).

Assuming, arguendo, that the request to allow the jurors to vote in the general election could be viewed as deficient performance on the part of defense counsel, the Petitioner has not met the prejudice prong of the *Strickland* test, i.e., he has not shown a reasonable probability that but for such deficient performance, the result would have been different. It appears from the record that State Question 593, and the length of time served by persons sentenced to life imprisonment, were the subject of much publicity prior to the election. The Petitioner has not shown that allowing the jurors to vote exposed them to anything they had not already read or heard. Each of the jurors had been questioned extensively on voir dire concerning his or her ability and willingness to consider both life imprisonment and capital punishment, and each had assured the court that they could give fair consideration to both possible punishments.[20] The Court concludes that the

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the County Election Board. (Tr. Vol. V, p. 186). Defense counsel did not challenge these assertions.

[20] See Tr. Vol. II, pp. 189-190 (Mr. Cullen); Tr. Vol. II, pp. 179-180, 183 (Ms. Martin); Tr. Vol. I, pp. 144, 172 (Ms. Montambault); Tr. Vol. II, pp. 152, 160-162 (Dr. Allen); Tr. Vol. II, pp. 210, 212 (Ms. Walker); Tr. Vol. II pp. 219, 221, 225 (Ms. Bryant); Tr. Vol. II, pp. 101-103, 110-111

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Petitioner has failed to show either that his trial attorneys' performance was rendered unreasonable and ineffective by virtue of their request to allow jurors to vote, or that he was prejudiced thereby. *Strickland v. Washington*, 466 U. S. 668, 690-692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

G. Likelihood of Different Result.

In determining whether the Petitioner has made the requisite showing that he was prejudiced by any of trial counsel's alleged errors, the Court observes that the evidence in support of two of the aggravating circumstances was particularly strong. First, the evidence convincingly showed that the Petitioner knowingly created a risk of death to more than one person. The Petitioner committed his crimes at three different locations, driving from place to place, shooting a total of seven unarmed people, including a young child. Second, the state offered compelling evidence that the Petitioner posed a continuing threat to society. The state's evidence at trial showed that the Petitioner had expressed no remorse for the shootings. The state further showed that the Petitioner had shot several people with no provocation whatsoever, and had attempted or threatened to kill others. The state's evidence also showed that the Petitioner had threatened and physically attacked his fellow employees in other places

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(Ms. Skirlock); Tr. Vol. I, pp. 144, 188 (Ms. Stewart); Tr. Vol. I, pp. 144-145, 186 (Mr. Scott); Tr. Vol. I, pp. 144-145 (Mr. Lyle); Tr. Vol. I, pp. 144-145 (Ms. Blazy); Tr. Vol. I, pp. 144-145 (Ms. Snyder). One prospective juror was excused because he expressed reluctance to consider life imprisonment as a possible punishment. (Tr. Vol. II, pp. 207-208).

where he had worked, and that he had physically assaulted two women on prior occasions.[21]

Ground Two:

Ineffective Assistance of Appellate Counsel

The Petitioner next argues that he was denied the effective assistance of counsel on direct appeal because his appellate counsel failed to assert, as grounds for appeal, ineffective assistance of trial counsel and the erroneous instruction on the defense of insanity.[22] In reviewing a habeas corpus petitioner's claim of ineffective assistance of appellate counsel, federal courts apply the same, highly deferential standard applicable to claims of ineffective assistance of trial counsel. As the Supreme Court has

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[21] The Petitioner's hour-long shooting rampage is described on pages 4 through 6 *infra*. The state's evidence showed not only that the Petitioner had demonstrated no remorse for the killings, and that he had acted calmly and coolly in the commission of each crime. The state also offered evidence that the Petitioner had threatened and assaulted former co-workers prior to the shootings, and that he had committed relatively minor physical assaults upon Cheryl James and another former girlfriend. The state appellate court found, on direct appeal, that this evidence supported the jury's finding of a probability that the Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. *Ellis I*, 867 P. 2d at 1302.

[22] In his brief in chief on direct appeal, the Petitioner's counsel raised twenty-two propositions of error, including claims based upon the composition of the jury and voir dire procedures, claims based on the exclusion of some evidence and the admission of other evidence, and challenges to several of the instructions in both the first and second phases. Appellate counsel also claimed that the Petitioner's death sentences constitute cruel and unusual punishment in view of his mental illness. (Appellant's Brief, filed with the Oklahoma Court of Criminal Appeals in Case No. F-86-887 on July 21, 1988).

explained, it is all too tempting for a criminal defendant to second-guess an attorney's performance after an adverse outcome, and it is all too easy for a court, examining counsel's briefs and arguments after they have proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Burger v. Kemp*, 483 U. S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987). A fair assessment of appellate counsel's performance requires the Court to make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged omission, and to evaluate the case from counsel's perspective at the time. *Burger v. Kemp*, 483 U. S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987); *Strickland v. Washington,* 466 U. S. at 689, 104 S. Ct., at 2065.

The Sixth Amendment does not require an attorney to raise every non-frivolous issue on appeal. *See Jones v. Barnes*, 463 U. S. 745, 751, 103 S. Ct. 3308, 3312-3313, 77 L. Ed. 2d 987 (1983). Indeed, the weeding out of weaker claims to be raised on appeal has been described as "the hallmark of effective advocacy." *Tapia v. Tansy*, 926 F. 2d 1554, 1564 (10th Cir. 1991), *cert. denied,* 502 U. S. 835, 112 S. Ct. 115, 116 L. Ed. 2d 84 (1991). *See also Miller v. Keeney*, 882 F. 2d 1428, 1434 (9th Cir. 1989) (Effective appellate attorneys weed out weaker arguments on appeal, and "focus on those more likely to prevail"); *Smith v. Murray*, 477 U. S. 527, 536, 106 S. Ct. 2661, 2667, 91 L. Ed. 2d 434 (1985). The Tenth Circuit has held that relief will be granted based on an appellate attorney's omission of a claim only if appellate counsel has failed to argue a "dead-bang winner," i.e., an issue which was obvious from the trial record, and which would have resulted in a reversal on appeal. *See United States v. Cook*, 45 F.3d 388,

392-393 (10th Cir. 1995); *Banks v. Reynolds*, 54 F. 3d 1508, 1515 (10th Cir. 1995); *Parker v. Champion*, 148 F. 3d 1219, 1221 (10th Cir. 1998), *cert. denied,* 525 U. S. 1151, 119 S. Ct. 1053, 143 L. Ed. 2d 58 (1999).

The Court has separately addressed each of the Petitioner's claims of ineffective assistance of trial counsel, and has found each of them to lack merit. (See Ground One, *supra*). The Tenth Circuit has held that a habeas corpus petitioner bears the burden of showing that his appellate counsel omitted a "dead bang winner" issue, defined as an issue that was "obvious from the record, and one which would have resulted in a reversal on appeal." *United States v. Cook*, 45 F. 3d 388, 393-395 (10th Cir. 1995); *Parker v. Champion*, 148 F. 3d 1219, 1221 (10th Cir. 1998), *cert. denied*, 525 U. S. 1151, 199 S. Ct. 1053, 143 L. Ed. 2d 58 (1999). Because the underlying claims lack merit, the Court finds that appellate counsel's failure to raise them does not render counsel's performance unreasonable in light of prevailing professional norms. Likewise, because these issues would not have been successful on direct appeal, the Petitioner has not shown that he was prejudiced by appellate counsel's failure to raise them.

The Petitioner's claim that his appellate counsel was ineffective for failing to assert his current challenge to the trial court's insanity instruction raises more serious concerns. Because this claim is inextricably intertwined with the Petitioner's challenge to the insanity instruction on the merits, the Court will address these claims together in its analysis of Ground Six, *infra*.

Ground Three:

Use of Peremptory Challenges to Exclude Minorities

The Petitioner next argues that the State violated his Equal Protection rights by exercising its peremptory challenges to exclude racial minorities from serving on the jury, citing *Batson v. Kentucky*, 476 U. S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). *See also Powers v. Ohio*, 499 U. S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d (1991) (extending the *Batson* principles, holding that a criminal defendant can object to race-based exclusion of jurors even when the excluded juror and the defendant are not of the same race). The Plaintiff initially complains of the state's peremptory removal of two African American prospective jurors. In his reply brief, the Petitioner also complains of the prosecutor's removal of two Native American prospective jurors.

The trial judge noted on the record that the Petitioner was black, and asked each prospective juror to state his or her nationality. Although the Petitioner did not raise a *Batson* challenge at trial, or otherwise complain of the prosecutor's use of peremptory challenges, the trial judge required the state to explain its reasons for striking two African Americans from the jury. The prosecutor explained that he chose to excuse Lola Mae Johnson because he feared that she would be "worrying about how she is going to feed her family and pay her bills," and thus might be unable to devote her full attention to the trial. (Tr. Vol. II, pp. 130). The prosecutor explained that he removed Mr. Adam Walker because Mr. Walker was 78 years of age, because Mr. Walker had fallen asleep several times during voir dire, because he sometimes spoke at inappropriate times in court, and because he "rambled on" when he

answered questions directed to him. (Tr. Vol. I, p. 246).[23] Obviously the prosecutor's stated reasons for excusing Mr. Walker were racially neutral, and the Petitioner makes no attempt to show that the stated reasons were a pretext for racial discrimination.[24]

The Petitioner argues that the prosecutor's stated reasons for excusing Ms. Johnson were actually a pretext for racial discrimination. In his Amended Petition, the Petitioner attempts to compare Ms. Johnson's circumstances and characteristics with those of Dr. Harold Allen, a white man. The Petitioner's argument is unpersuasive. Ms. Johnson testified on voir dire that she was divorced, that she was self-employed as a cosmetologist (beautician), and that if the trial lasted more than one week it would work a financial hardship on her. (Tr. Vol. II pp. 120-123).

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[23] Apparently Mr. Walker frequently muttered "yeah" or "yes sir" when other jurors were being questioned. The prosecutor explained that he found this to be a disturbing influence. (Tr. Vol. I, p. 246). The trial judge confirmed the prosecutor's observations of Mr. Walker's demeanor. The trial judge confirmed that Mr. Walker would "speak out quite a bit" when someone else was answering questions, although he doubted that the court reporter could have recorded all of these utterances. (Tr. Vol. I, p. 247).

[24] "Once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation" for the strike. *See Batson*, 476 U. S. at 97. To be neutral, a peremptory strike must be "based on something other than the race of the juror" and "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U. S. 352, 360, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); *Purkett v. Elem*, 514 U. S. 764, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834 (1995). A legitimate, racially neutral reason "is not a reason that makes sense, but a reason that does not deny equal protection."

Ms. Johnson expressed the fear that jury service might cause her to lose customers, and stated that she would be thinking about this problem while sitting in the courtroom. (Tr. Vol. II, pp. 124). Ms. Johnson was so concerned and embarrassed about her financial hardship that she was allowed to explain the situation to the judge and counsel outside the hearing of the other prospective jurors. (Tr. Vol. II, pp. 128-129). The prosecutor moved to have Ms. Johnson excused for cause on the ground of financial hardship. (Tr. Vol. II, pp. 130). The trial judge overruled the motion. The prosecutor exercised a peremptory challenge to remove Ms. Johnson at the judge's suggestion. (Tr. Vol. II, pp. 130, 142).[25]

The Petitioner points out that Dr. Allen was also "self-employed," and that he was the sole source of financial support for his wife and family.[26] Dr. Allen, a dentist in private practice, testified on voir dire that he was concerned about the effect prolonged jury service might have on his practice. (Tr. Vol. II, p. 150). However, it is clear from the record that Dr. Allen did not express the degree of concern for the financial hardship of jury service that Ms. Johnson expressed. Dr. Allen did not mention the prospect of losing customers or patients, or the fear of being unable to pay his bills. In fact, when asked whether he could

[25] It appears that when they were arguing the motion to remove Ms. Johnson for cause, both the prosecutor and defense counsel were under the impression that Ms. Johnson was the sole support of her family. In fact, Ms. Johnson testified in response to one of the first questions asked of her that she was divorced and lived alone. (Tr. Vol. II, pp. 130, 120).

[26] Dr. Allen testified that he was married, that his wife did not work outside the home, and that they had two teenage children.

rearrange his scheduled appointments for the expected duration of the trial, Dr. Allen answered: "Sure, I'll just cancel them." (Tr. Vol. II, p. 153). Clearly Dr. Allen's circumstances were different from Ms. Johnson's.

The Petitioner's complaint concerning the removal of two Native Americans from the jury is also unavailing. Two individuals identified themselves as Native Americans during voir dire, Ms. Tehee and Ms. Dennis. The Petitioner did not object to the exclusion of these two prospective jurors at trial, and the trial court did not raise the issue *sua sponte*.[27] When the Petitioner raised a *Batson* challenge based on the exclusion of the two Native American venire members on direct appeal, the state Court of Criminal Appeals held that the Petitioner had waived the issue by failing to object at trial. 867 P.2d at 1296.

The case law is clear that a *Batson* objection must be made as soon as possible, and preferably before the jury is sworn. *United States v. Contreras-Contreras*, 83 F. 3d 1103 (9th Cir.), *cert. denied*, 519 U. S. 903, 117 S. Ct. 259, 136 L. Ed. 2d 184 (1996); *United Sates* [sic] *v. Pulgarin*, 955 F. 2d 1 (1st Cir. 1992). The contemporaneous objection rule is

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[27] At the time of the Petitioner's trial, *Batson* was a very recent pronouncement. The Petitioner's trial predated *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), which extended the *Batson* rule to hold that under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race. Based upon prevailing case law at the time, the trial judge evidently thought it necessary to question the prosecutor's reasons for removing minority members of the Petitioner's own race.

especially pertinent to *Batson* claims, where innocent oversight can so readily be remedied, and an accurate record is so crucial on appeal. *Pulgarin*, *supra*. *See also Sledd v. McCune*, 71 F. 3d 797, 799 (10th Cir. 1995); *United States v. Chandler*, 996 F. 2d 1073 (11th Cir. 1993); *Thomas v. Moore*, 866 F. 2d 803, 804-805 (5th Cir.), *cert. denied*, 493 U. S. 840, 110 S. Ct. 124, 107 L. Ed. 2d 85 (1989). The Petitioner neither complained about the racial composition of the jury nor objected to the prosecutor's exercise of peremptory challenges. Nor did the Petitioner attempt to make a prima facie showing of racial discrimination based on the exclusion of the two Native American jurors. Because the Petitioner did not raise the issue, the trial court was never called upon to make a determination of whether a prima facie showing of discrimination had been made based on the exclusion of these individuals. Likewise, the prosecutor was never given an opportunity to explain his reasons for striking these prospective jurors. 867 P. 2d at 1295-1296.[28] The Court agrees with the Court of Criminal Appeals that the Petitioner has waived the issue by failing to make a timely objection.

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[28] Although the prosecutor was never called upon to explain his reasons for excusing Ms. Tehee and Ms. Dennis, the Court takes judicial notice that the prosecutor gave an explanation of his reason for excluding Ms. Tehee: Ms. Tehee was a 21-year-old college student, who testified on voir dire that she would have "problems with school" and would be under pressure if the trial went into the following week. Ms. Tehee also testified that she wasn't sure she could get a good night's rest while trying to catch up on her studying. (Tr., Vol. II, pp. 22-23). At the conclusion of her voir dire testimony, the lead prosecutor remarked: "With absolute confidence this trial is going into next week, Judge, we will excuse Ms. Tehee." (Tr., Vol. II, pp. 47-48).

Ground Four:

Constitutional Challenge to Oklahoma's Jury Selection Process

The Petitioner next challenges Oklahoma's statutory exemption which allows persons over seventy years of age to excuse themselves from jury service without further cause, citing *Duren v. Missouri*, 439 U. S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979). See Title 38 Okla. Stat. § 28.[29] The Petitioner claims that because a total of forty-eight persons were excused from jury service in Oklahoma County under this provision the week his trial began, his jury did not represent a fair cross-section of the community.[30]

In *Duren*, *supra*, the Supreme Court held that a defendant may establish a prima facie violation of the fair cross-section of the community requirement by showing: (1) that the group alleged to have been excluded is a "distinctive" group in the community; (2) that the representation of

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[29] The version of Section 28 in effect at the time of the Petitioner's trial provided, in part:

> "[P]rovided, that persons over seventy (70) years of age shall not be compelled to serve as jurors in this state and the court may excuse or discharge any juror drawn and summoned as a grand or petit juror if jury service would result in substantial hardship to the prospective juror."

Title 38 Okla. Stat. (1981) § 28. The current version is similar.

[30] It appears from the record that some 600 jury summonses were issued by the Oklahoma County District Court for the week in which the Petitioner's trial began. Of that number, 257 reported for jury duty, and 244 were excused for various reasons. Forty-eight of those excused were excused because they were over the age of 70. (Tr. Vol. I, pp. 19-21). Some of the 257 who reported sat on venire panels, as needed.

this group in the venire pools from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of the group in the jury selection process. *See Duren*, 439 U. S. at 364, 99 S. Ct. at 668, 58 L. Ed.2d at 587. The Oklahoma Court of Criminal Appeals rejected the Petitioner's fair cross-section claim in his direct appeal, reasoning that the Petitioner had not shown that persons over the age of seventy constitute a distinctive group. *See Ellis v. State of Oklahoma*, 867 P. 2d at 1294, *citing Moore v. State of Oklahoma*, 736 P. 2d 161, 165 (Okla. Crim. App.), *cert. denied*, 484 U. S. 873, 108 S. Ct. 212, 98 L. Ed. 2d 163 (1987).[31]

The federal courts of appeals have likewise held that various age groups are not "distinctive" enough for Sixth Amendment fair cross-section purposes, as that term was used in *Duran* [sic], *supra*. *See United States v. Test*, 550 F. 2d 577, 590-593 (10th Cir. 1976) (Rejecting 21- to 39-year-olds as a "distinctive group"); *United States v. Ross*, 468 F. 2d 1213, 1217 (9th Cir. 1972) (Younger people are not a "distinctive group" for purposes of a *Duran* [sic] challenge), *cert. denied*, 410 U. S. 989, 93 S. Ct. 1500, 36 L. Ed. 2d 188

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[31] In *Moore*, *supra*, the Oklahoma Court of Criminal Appeals applied the Supreme Court's *Duren* ruling, correctly reciting the elements a defendant must show to establish a prima facie violation of the fair-cross-section requirement, i. e.: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in the pools from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of the group in the jury selection process.

(1973); *United States v. Kuhn*, 441 F. 2d 179, 181 (5th Cir. 1971); *United States v. DiTommaso*, 405 F. 2d 385, 391 (4th Cir. 1968), *cert. denied*, 394 U. S. 934, 89 S. Ct. 1209, 22 L. Ed. 2d 465 (1969); *Johnson v. McCaughtry*, 92 F. 3d 585 (7th Cir.) (Persons age 18 to 25 are not a "distinctive group" for purposes of fair cross-section requirement), *cert. denied*, 519 U. S. 1034, 117 S. Ct. 596, 136 L. Ed. 2d 523 (1996); *Davis v. Greer*, 675 F. 2d 141, 146 (7th Cir.), *cert. denied*, 459 U. S. 975, 103 S. Ct. 310, 74 L. Ed. 2d 289 (1982); *Silagy v. Peters*, 905 F. 2d 986 (7th Cir. 1990) (Persons over age 70 do not constitute a "distinctive group" whose exclusion from jury service violated fair cross-section requirement), *cert. denied*, 498 U. S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991). *See also United States v. LaChance*, 788 F. 2d 856 (2nd Cir.), *cert. denied*, 479 U. S. 883, 107 S. Ct 271, 93 L. Ed. 2d 248 (1986); *Brown v. Harris*, 666 F. 2d 782 (2nd Cir. 1981), *cert, denied*, 456 U. S. 948, 102 S. Ct. 2017, 72 L. Ed. 2d 472 (1982).[32] The Petitioner's challenge to the composition of the jury based upon the statutory exemption for persons over seventy years of age is without merit.

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[32] The Court further notes that in a class action lawsuit alleging systematic exclusion of blacks from jury service in Alabama, the Supreme Court reasoned: "It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifications for their jurors. The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character." *Carter v. Jury Commission of Greene County*, 396 U. S. 320, 332, 90 S. Ct. 518, 524-525, 24 L. Ed. 2d 549 (1970) (footnotes omitted).

Ground Five:

Failure to Permit Individual Voir Dire of Jurors

The Petitioner next claims error based on the trial court's refusal to allow him to conduct individual voir dire of each of the prospective jurors on the issue of capital punishment. The Petitioner alleges that his jurors were "exposed to peer group pressure" by being questioned on their views of the death penalty in front of the full venire, and that his jurors were exposed to prejudicial comments by venire members Edward A. Krei and Ronald A. Babb.

On direct appeal, the Oklahoma Court of Criminal Appeals rejected this claim, reasoning that the manner of conducting voir dire is left to the discretion of the trial judge. *Ellis v. State of Oklahoma*, 867 P. 2d at 1295, *citing Foster v. State of Oklahoma*, 714 P. 2d 1031, 1037 (Okla. Crim. App.), *cert. denied*, 479 U. S. 873, 107 S. Ct. 249, 93 L. Ed. 2d 173 (1986) ("*Ellis I*"). The court further noted that the trial judge had allowed individual voir dire outside the presence of the other potential jurors in at least one instance when it appeared necessary. *Ellis I*, 867 P. 2d 1289 at 1295.

The state court's adjudication of this issue clearly meets constitutional standards. The Supreme Court has stressed the wide discretion granted to trial courts in conducting voir dire of potential jurors. *See Mu'Min v. Virginia*, 500 U. S. 415, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991). This Court, on habeas corpus, affords a limited review of the state trial court's rulings on voir dire, reflecting the broad deference traditionally accorded to trial courts in determining jury selection procedures, *Lucero v. Kerby*, 133 F. 3d 1299 (10th Cir.), 523 U. S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998); *Mu'min*, 500 U.S. at 423,

111 S. Ct. at 1904. Such a limited review is appropriate since, unlike this Court, a trial judge has the benefit of observing the demeanor of the jurors in determining issues of bias or partiality, *Brecheen v. Reynolds*, 41 F. 3d 1343, 1350 (10th Cir. 1994), *cert. denied*, 515 U. S. 1135, 115 S. Ct. 2564, 132 L. Ed. 2d 817 (1995); *Church v. Sullivan*, 942 F. 2d 1501, 1519 (10th Cir. 1991). Therefore, to establish a due process violation based on a trial court's refusal to allow individual, sequestered voir dire, a habeas corpus petitioner "must demonstrate either that the trial resulted in actual prejudice, or that it gave rise to a presumption of prejudice because it involved 'such a probability that prejudice will result that it is deemed inherently lacking in due process.'" *Brecheen*, 41 F. 3d at 1350, *quoting Estes v. Texas*, 381 U. S. 532, 542-543, 85 S. Ct. 1628, 1633, 14 L. Ed. 2d 543 (1965); *Lucero v. Kerby*, 133 F. 3d 1299, 1308 (10th Cir. 1998), *cert. denied*, 523 U. S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

Here the Petitioner alleges "prejudice" in the form of a few comments made by prospective jurors Krei[33] and Babb,[34] both of whom were ultimately excused for cause. It

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[33] In response to questions from the trial judge, Mr. Krei testified that he had "no reservations whatsoever about the death penalty," but that, based on what he had heard about the Petitioner's case, he "personally would have reservations about recommending a life sentence . . . " (Tr. Vol. II, pp. 173-174). Upon further questioning, Mr. Krei stated that he would have "some bias" in favor of the death penalty, that he "firmly believe[d] in the death penalty," and that he didn't believe he could consider a life sentence. (Tr. Vol. II, p. 174). The judge then granted a defense motion to excuse Mr. Krei for cause. (Tr. Vol. II, pp. 174-175).

[34] In response to questioning by the trial judge, Mr. Babb answered that he could consider both possible punishments for the murder

(Continued on following page)

appears that the remarks of which the Petitioner complains were, at most, expressions of the individual jurors' personal views or beliefs concerning life imprisonment and the death penalty. The Petitioner has not shown that the remarks were especially inflammatory or pervasive, or that the remarks were otherwise so prejudicial to him as to constitute a due process violation. The Court concludes that the trial court did not err in denying the Petitioner's motion for individual, sequestered voir dire. The Petitioner is not entitled to relief on this ground.

Ground Six:

Use of a Defective Insanity Instruction

The Petitioner next claims that the trial court erred in giving a defective insanity instruction. Because this error was not raised on direct appeal, the state appellate court has found the claim to be procedurally barred. The Petitioner argues that his appellate counsel's failure to raise the issue constitutes ineffective assistance of counsel, and constitutes cause and prejudice for his procedural default. The Court addresses both the substantive claim of jury

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charges, life imprisonment and death. (Tr. Vol. II, p. 199). Mr. Babb testified that while be had no reservations about his ability to review the evidence in an impartial manner, he feared that in the event of a guilty verdict, he would "probably have a difficult time voting for anything less than the death penalty" because of his personal views. (Tr. Vol. II, p. 202). At that point, the trial judge called a recess, during which he excused the other venire members from the courtroom and questioned Mr. Babb outside their presence. Mr. Babb maintained that he would have difficulty considering a sentence of life imprisonment, and the trial judge granted defense counsel's challenge for cause. (Tr. Vol. II, pp. 202-208).

instruction error and the corresponding claim of ineffective assistance.

A. Background

In stating the test for legal insanity, and the defendant's burden in regard thereto, the trial court instructed the jury as follows:

> "You are therefore instructed that if, after considering all the evidence in this case, you believe beyond a reasonable doubt that the Defendant committed the acts charged in the Information and that at that time the Defendant knew the nature and consequences of his act and knew that it was wrong, and was able to distinguish between right and wrong as applied to said act, then and in that event you would not be justified in acquitting him by reason of insanity.
>
> On the other hand, if, after considering all of the evidence in the case, you entertain a reasonable doubt as to whether the Defendant was mentally competent to understand the nature and consequences of his act or acts, to distinguish between right and wrong as applied to said act, ***and*** to knwo (sic) that it was wrong, then and in that event it is your duty to resolve that doubt in the Defendant's favor and acquit him on the grounds of insanity, and state that fact in your verdict."

(Instruction No. 18, emphasis added).

The Petitioner claims that this instruction deprived him of a fair trial and a reliable verdict in violation of the Eighth and Fourteenth Amendments. The Petitioner complains, specifically, that the last sentence of this

instruction erroneously used the conjunctive term "and" where it should have used the disjunctive term "or," and thus the jury was permitted to acquit him by reason of insanity only if it found *both* that he did not understand the nature and consequences of his acts, *and* that he was unable to distinguish right from wrong.

The record supports the Respondent's contention that the foregoing insanity instruction was not challenged by defense counsel at trial (Tr. Vol. V, pp. 3-7), and that it was not initially challenged by appellate counsel on direct appeal.[35] After the Oklahoma Court of Criminal Appeals affirmed the Petitioner's convictions and sentences on July 24, 1992,[36] the Petitioner's appellate counsel filed a petition

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[35] The Petitioner's direct appeal brief, filed July 21, 1988, challenged the trial court's insanity instruction on the ground that it impermissibly shifted the burden of persuasion onto the defense, but not on the ground asserted here, i. e., that it misstated the essential elements of the insanity defense by using the conjunctive term "and," rather than the disjunctive term "or."

[36] The Court of Criminal Appeals affirmed the Petitioner's convictions in their entirety, but found that the "heinous, atrocious or cruel" aggravating circumstance was improperly applied because the trial court failed to instruct the jury that it was limited to those cases in which torture or serious physical abuse preceded death. *See Ellis v. State of Oklahoma*, 867 P. 2d 1289, 1301 (Okla. Crim. App. 1992). The court then re-weighed the remaining aggravating circumstances, i. e., (A) that the appellant knowingly created a great risk of death to more than one person, Title 21 Okla. Stat. § 701.12 (2); and (B) the existence of a probability that the Petitioner would commit criminal acts of violence that would constitute a continuing threat to society, Title 21 Okla. Stat. § 701.12 (7). Upon re-weighing these remaining aggravating circumstances against the mitigating evidence presented at trial, the court found the death sentences to be "factually substantiated and appropriate," and affirmed them.

for rehearing with the state appellate court, which again did not challenge the insanity instruction.

During the pendency of the petition for rehearing, the Oklahoma Court of Criminal Appeals issued its opinion in *Johnson v. State of Oklahoma*, 841 P. 2d 595 (Okla. Crim. App. 1992), reversing a first degree murder conviction and life sentence based on an insanity instruction identical to the one given in the Petitioner's trial.[37] The court in *Johnson* held that the instruction erroneously required the jury to find the defendant insane under both prongs of the *M'Naghten*[38] test, rather than just one, before acquitting him. The *Johnson* opinion was first published in the November 7, 1992 edition of the *Oklahoma Bar Association Journal*.

On November 23, 1992, within days of publication of the *Johnson* decision, the Petitioner's appellate counsel filed a motion to amend his petition for rehearing to include a challenge to the insanity instruction, citing

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[37] The reported opinion in *Johnson* does not give the full text of the instruction which prompted the reversal of the conviction. The portion of the instruction quoted in the *Johnson* opinion reads as follows:

> "On the other hand, if, after considering all of the evidence in the case, you entertain a reasonable doubt as to whether the defendant was mentally competent to understand the nature and consequences of his act, to distinguish between right and wrong as applied to said act, and to know that it was wrong, then in that event it is your duty to resolve the doubt in the defendant's favor and acquit him on the ground of insanity, and state that fact in your verdict."

See Johnson, 841 P. 2d at 596. This language is substantially identical to that in the instruction given at the Petitioner's trial.

[38] *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

Johnson.[39] The Court of Criminal Appeals denied the motion to amend, and on January 26, 1994 denied rehearing in an opinion which does not address the Petitioner's challenge to the insanity instruction. This Court's review of the record has revealed no explanation for the state court's denial of leave to amend.

The Petitioner next attempted to challenge the insanity instruction in his application for post-conviction relief filed in the trial court on March 2, 1995. The trial court denied the application on April 28, 1995, and the Petitioner appealed, again challenging the insanity instruction. On June 25, 1997, the state Court of Criminal Appeals affirmed the denial of post-conviction relief, finding that the Petitioner's *Johnson*-based challenge to the insanity instruction was procedurally barred. *See Ellis v. State of Oklahoma*, 941 P. 2d 527 (Okla. Crim. App. 1997).[40]

Following a preliminary review of the Petition, the record and the supporting briefs, this Court determined that this claim presented an unresolved question of Oklahoma law, namely, whether the *Johnson* holding that the use of the word "and" rather than the word "or" in the insanity instruction constitutes fundamental error requiring reversal under state law, where there is insufficient

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[39] The November 23, 1992 motion to amend is not part of the record presented to this Court. Nevertheless, it appears the Respondent concedes that the motion was made, and that it was denied on December 22, 1992. (See Respondent's brief, pp. 19-20; Appellee's brief filed on behalf of the state on October 19, 1995, p. 14).

[40] The court rejected the Petitioner's claim that his trial and appellate counsel were ineffective for failing to raise the issue.

evidence to permit a reasonable jury to find the defendant to be insane. This question is central to the issue of whether appellate counsel's performance was rendered ineffective by failing to challenge the instruction in the Petitioner's direct appeal. Accordingly, this Court certified the question to the Oklahoma Court of Criminal Appeals, which has now answered the question in the negative.[41]

B. Application of State Procedural Bar.

The Oklahoma Court of Criminal Appeals held the Petitioner's challenge to the insanity instruction to be procedurally barred. Citing Rule 3.14 of the Rules of the Oklahoma Court of Criminal Appeals, Title 22 Okla. Stat.

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[41] This Court certified the following question:

> "Does the Court's holding in Johnson v. State of Oklahoma, 841 P. 2d 595 (Okla. Crim. App. 1992), that the use of the conjunctive word "and" rather than the disjunctive word "or" in an instruction defining the M'Naghten test for insanity in a first-degree murder trial constitutes fundamental error requiring reversal, apply in a case where there is insufficient evidence to permit a reasonable jury to find the defendant to be insane under the M'Naghten test?"

Along with the order certifying this question, the Court submitted a statement of facts reciting that although the Petitioner offered some evidence at trial tending to show that he may have suffered from some form of mental illness or emotional distress around the time of his crimes, none of the Petitioner's evidence shows that he did not know the nature and consequences of his acts, or that he was unable to distinguish between right and wrong. Utilizing this statement of facts, the Oklahoma Court of Criminal Appeals found that giving the incorrect instruction does not require reversal as a matter of Oklahoma law in a case where no reasonable jury could find the defendant to be insane under an instruction correctly defining the M'Naghten test.

(1991), Ch. 18, App.,[42] the court found that the issue was "one which could have been ascertained from previous case law," and thus was waived by failure to assert it on direct appeal. 941 P. 2d at 531.[43] On habeas corpus review, federal courts do not address issues that have been defaulted in state court on an independent and adequate state procedural ground, unless the petitioner can demonstrate both cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *English v. Cody*, 146 F. 3d 1257, 1259 (10th Cir. 1998), *citing Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *West v. Gibson*, 182 F. 3d 934 (text at 1999 WL 339702) (10th Cir. 1999). It is undisputed here that the Oklahoma rule holding issues to be waived if not timely raised on direct appeal is an "independent" rule of state

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[42] At the time of the Petitioner's direct appeal, Rule 3.14 read, in part:

> "B. A petition for rehearing shall not be filed, as a matter of course, but only for the following reasons:
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> (1) That some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or
>
> (2) That this decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument."

[43] The court reasoned: "We find that neither subsection (1), nor subsection (2) [of Rule 3.14B] was applicable in the instant case. The issue was not even raised on direct appeal: therefore, there can be no conflict per se. Further, if one could not (under then-existing rules) raise a new issue in a supplemental brief, one clearly could not raise a new issue in a petition for rehearing. Accordingly, the Court acted properly when it declined to address the issue on rehearing." 941 P. 2d at 530-531.

law.[4] Thus, the application of the procedural bar in this instance turns upon whether the procedural bar is "adequate," and, if so, whether the Petitioner has demonstrated cause and prejudice for his failure to raise the issue on direct appeal.

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[4] In the Petitioner's post-conviction appeal, the Court of Criminal Appeals acknowledged that whereas *Valdez v. State of Oklahoma*, 933 P. 2d 931, 934 (Okla. Crim. App 1997) was reviewed in accordance with the 1995 amendments to the Uniform Post-Conviction Procedure Act, Title 22 Okla. Stat. § 1089(D)(1), the Petitioner's post-conviction application was filed prior to those amendments. 941 P. 2d at 531. The Act has always provided petitioners with very limited grounds upon which to base a collateral attack on their convictions and sentences. Under the prior version of the Act, claims which could have been raised in previous appeals but were not were generally waived; and claims raised in direct appeal were res judicata. *Thomas v. State of Oklahoma*, 888 P. 2d 522, 525 (Okla. Crim. 1994), *cert. denied*, 516 U. S. 840, 116 S. Ct. 123, 133 L. Ed. 2d 73 (1995); *Castro v. State*, 814 P. 2d 158, 159 (Okla. Crim. App. 1991), *cert. denied*, 502 U.S. 1063, 112 S. Ct. 947, 117 L. Ed. 2d 116 (1992). Oklahoma Courts have noted that the 1995 amendments to the Act "make[] it even more difficult for capital post-conviction applicants to avoid procedural bars. *Walker v. State of Oklahoma*, 933 P. 2d 327, 331 (Okla. Crim. App.), *cert. denied*, 521 U. S. 1125, 117 S. Ct. 2524, 138 L. Ed.2d 1024 (1997); *Gilbert v. State of Oklahoma*, 955 P. 2d 727 (Okla. Crim. App.), *cert. denied*, 525 U. S. 890, 119 S. Ct. 207, 142 L. Ed. 2d 170 (1998). Under the current version of Title 22 Okla. Stat. (Supp. 1995) § 1089(C)(1), only claims which "[w]ere not and could not have been raised" on direct appeal will be considered. A capital post-conviction claim could not have been raised on direct appeal if: (1) it is an ineffective assistance of trial or appellate counsel claim which meets the statute's definition of ineffective counsel; or (2) the legal basis of the claim was not recognized or could not have been reasonably formulated from a decision of the United States Supreme Court, a federal appellate court or an appellate court of this State, or is a new rule of constitutional law given retroactive effect by the Supreme Court or an appellate court of Oklahoma. Title 22 Okla. Stat. (Supp.1995), §§ 1089 (D) (4) (b), 1089 (D) (9).

As a general rule, in order to be "adequate," a state rule of procedural default must be applied even-handedly in the vast majority of cases. *English*, *supra*, *citing Maes v. Thomas*, 46 F. 3d 979, 985-986 (10th Cir.), *cert. denied*, 514 U. S. 1115, 115 S. Ct. 1972, 131 L. Ed. 2d 861 (1995). *See also Rogers v. Gibson*, 173 F. 3d 1278 (10th Cir. 1999) (State procedural ground is "adequate" if it has been strictly and regularly followed and applied even-handedly to all similar claims), *cert. denied*, 120 S. Ct. 944, 145 L. Ed. 2d 820 (2000). The Tenth Circuit has observed that Oklahoma "strictly and regularly" applies its procedural bar to issues not timely raised on direct appeal. *West v. Gibson*, 182 F. 3d 934 (text at 1999 WL 339702) (10th Cir. 1999), *citing Odum v. Boone*, 62 F. 3d 327, 331 (10th Cir. 1995); *Brecheen v. Reynolds*, 41 F. 3d 1343, 1349 n. 4 (10th Cir. 1994), *cert. denied*, 515 U. S. 1135, 115 S. Ct. 2564, 132 L. Ed. 2d 817 (1994); *Steele v. Young*, 11 F. 3d 1518, 1522 (10th Cir. 1993).[45] The Court thus finds the waiver

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[45] Oklahoma has recognized a limited exception to its waiver rule for what it terms "fundamental trial error," meaning certain errors of federal, constitutional dimension. *Ake v. Oklahoma*, 470 U. S. 68, 74-75, 105 S. Ct. 1087, 1091, 84 L. Ed. 2d 53 (1985), *citing Hawkins v. State of Oklahoma*, 569 P. 2d 490 at 493 (Okla. Crim. App. 1977); *Williams v. State of Oklahoma*, 658 P. 2d 499 (Okla. Crim. App. 1983). The Oklahoma Court of Criminal Appeals' decision in *Johnson*, *supra*, described an instruction error identical to the one asserted here as "fundamental," and held that the issue was not waived by the appellant's failure to make a contemporaneous objection at trial. 841 P. 2d 595, 596. In the Petitioner's post-conviction appeal, however, the court simply held the issue to be waived without considering whether the error was "fundamental." The Court does not regard this different treatment as inconsistent, however, because of the different procedural posture of the cases. In *Johnson*, the appellant failed to object to the faulty instruction at trial, but timely raised the issue on direct appeal. Here, the Petitioner did not raise the issue either at trial or on direct appeal. As the Tenth

(Continued on following page)

rule applied by the state appellate court in this case to be both an independent and adequate state procedural bar.

C. Ineffective Assistance of Appellate Counsel.

The Court next addresses the Petitioner's contention that his appellate counsel was ineffective, which the Petitioner asserts both as the "cause" of his procedural default, and as an independent claim for relief.[46] Constitutionally ineffective assistance of counsel constitutes sufficient "cause" to excuse a petitioner's procedural default. *Coleman v. Thompson*, 501 U. S. at 752; *Murray v. Carrier*, 477 U. S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); *Lopez*, 100 F. 3d 113, 117 (10th Cir. 1996); *Rogers*, 91 F. 3d 1388, 1391 (10th Cir. 1996), *cert. denied*, 519 U. S. 1134, 117 S. Ct. 1000, 136 L. Ed. 2d 879 (1997).

In his post-conviction appeal, the state appellate court rejected the Petitioner's attempt to show ineffective assistance of trial and appellate counsel as "cause" for his procedural default, holding that neither trial counsel nor

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Circuit has observed, the Oklahoma Court of Criminal Appeals does not apply its fundamental error exception to claims raised for the first time in post-conviction proceedings. *See Johnson v. Gibson*, 169 F. 3d 1239, 1249 (10th Cir.), *cert. denied*, ___ U. S. ___, 120 S. Ct. 415, 145 L. Ed. 2d 324 (1999); *citing Brecheen v. Reynolds*, 41 F.3d 1343, 1354 n. 10 (10th Cir.1994). Furthermore, as explained below, the Oklahoma Court of Criminal Appeals has now made it clear that *Johnson*-type instruction error does not result in reversal on appeal where, as in the Petitioner's case, there was insufficient evidence to permit the jury to find the defendant not guilty by reason of insanity.

[46] The Petitioner does not, in this proceeding, argue that his trial attorneys were ineffective for failing to object to the insanity instruction at trial.

appellate counsel had been ineffective in failing to challenge it.[47] *Ellis II*, 941 P. 2d at 531, *citing Valdez v. State of Oklahoma*, 933 P. 2d 931, 934 (Okla. Crim. App. 1997).[48]

The Court of Criminal Appeals' response to this Court's certified question offers further explanation for its holding that the claim is procedurally barred.[49] Although the court acknowledged that the Petitioner's direct appeal

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[47] In its post-conviction opinion, the Court of Criminal Appeals repeatedly – and incorrectly – referred to the insanity instruction given at the Petitioner's trial as a "uniform instruction." In Oklahoma, the only officially sanctioned "uniform" instructions are the Oklahoma Uniform Jury Instructions ("OUJI"), which state law requires trial courts to use wherever applicable. See Title 12 Okla. Stat. (1968) §§ 577.1, 577.2. The state's uniform jury instruction establishing the elements of an insanity defense, in effect at the time of the Petitioner's trial and at all subsequent times, is entirely different from the instruction given at the Petitioner's trial. The official, uniform jury instruction reads as follows:

> "A person is insane when that person is suffering from such a disability of reason or disease of the mind that he/she does not know that his/her acts or omissions are wrong and is unable to distinguish right from wrong with respect to his/her acts or omissions. A person is also insane when that person is suffering from such a disability of reason or disease of the mind that he/she does not understand the nature and consequences of his/her acts or omissions."

OUJI-CR 729 (1981), OUJI-CR 2d 8-32 (1996) The text of the instruction given at the Petitioner's trial appears on page 35, supra. The trial court record reveals no reason for departing from the uniform instruction. *See* Title 12 Okla. Stat. § 577.2 (directing the use of the OUJI instructions where applicable unless the court determines that they do not accurately state the law).

[48] This Court recognizes that whereas *Valdez* involved a claim based on an attorney's failure to challenge the applicable OUJI insanity instruction.

[49] The Petitioner's objection to the court considering the state court's answer to the certified question is addressed *infra*.

had been decided several months prior to *Johnson*, the court reasoned that the Petitioner could have ascertained the basis for his claim prior to *Johnson*, based on previous case law establishing the elements of the M'Naghten test in Oklahoma. *See, e. g., Pugh v. State of Oklahoma*, 781 P. 2d 843 (Okla. Crim. App. 1989). The court did not consider the insanity instruction claim when the Petitioner first raised it during the pendency of his petition for rehearing, because "it did not fall within either of the permissible grounds for rehearing set forth in Rule 3.14, Rules of the Oklahoma Court of Criminal Appeals."[50] *See White v. State of Oklahoma*, 900 P. 2d 982, 995 (Okla. Crim. App. 1995),

As set forth in the preceding sections, this Court applies a highly deferential standard of review to the Petitioner's claim that his appellate counsel was ineffective for failing to raise the instruction claim. *Burger, supra, quoting Strickland v. Washington*, 466 U. S. at 689, 104 S. Ct. at 2065. Relief will be granted based on the omission of a claim on appeal only if appellate counsel has failed to argue a "dead-bang winner," i.e., an issue which was "obvious from the trial record," and which "would

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[50] Rule 3.14 provides, in pertinent part:

"B. A petition for rehearing shall not be filed, as a matter of course, but only for the following reasons:

(1) Some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or

(2) The decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument."

Rule 3.14, Rules of the Oklahoma Court of Criminal Appeals.

have resulted in a reversal on appeal." *See United States v. Cook*, 45 F. 3d 388, 392-393 (10th Cir. 1995); *Banks v. Reynolds*, 54 F. 3d 1508, 1515 (10th Cir. 1995); *Parker v. Champion*, 148 F. 3d 1219, 1221 (10th Cir. 1998), *cert. denied*, 525 U. S. 1151, 119 S. Ct. 1053, 143 L. Ed. 2d 58 (1999).

The Court agrees with the Court of Criminal Appeals that the error in the insanity instruction could have been raised on direct appeal based upon pre-existing case law. Although at the time of briefing appellate counsel did not have the benefit of either the *Johnson* decision or of *Pugh v. State of Oklahoma*, 781 P. 2d 843, 844 (Okla. Crim. App. 1989), it is clear that the M'Naghten test, with its two alternative prongs, was firmly established in Oklahoma law long before the Petitioner's direct appeal was briefed.[51] Thus, competent counsel could have determined that an insanity instruction requiring a defendant to prove both prongs was erroneous even prior to *Johnson*. Likewise, it is clear from a review of the record that the insanity

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[51] As the Court of Criminal Appeals acknowledged in *Johnson*, *supra*, Oklahoma courts have long held that "M'Naghten is the only test used to determine criminal responsibility" where the defense of insanity is asserted. 841 P. 2d 595, *citing Pugh v. State of Oklahoma*, 781 P. 2d 843, 844 (Okla. Crim. App. 1989). In *Jones v. State*, 648 P. 2d 1251, 1254 (Okla. Crim. App. 1982), *cert. denied*, 459 U. S. 1155, 103 S. Ct. 799, 74 L. Ed. 2d 1002 (1983), the Oklahoma Court of Criminal Appeals specifically held that a defendant was legally insane if "during the commission of the crime he was suffering from a mental disease or defect rendering him unable to differentiate between right and wrong, *or* unable to understand the nature and consequences of his acts." 648 P. 2d at 1254 (emphasis added). The language used in *Jones* "followed explicitly the rule set forth in M'Naghten's case, and clearly shows that *both prongs* of the M'Naghten test are applied in Oklahoma." *Johnson*, 841 P. 2d 595, *citing Jones*, *supra* (emphasis added).

instruction given at the Petitioner's trial differed significantly from the state's uniform jury instruction on insanity. Thus, the Court finds the error in the insanity instruction to be one which is obvious from the trial record.

In deciding whether the error in the insanity instruction is one which would have resulted in a reversal on appeal, the Court turns first to *Johnson, supra*, in which the Oklahoma Court of Criminal Appeals reluctantly found that a similarly flawed insanity instruction constituted "fundamental error" which required reversal. The court's opinion in *Johnson* did not indicate what type or quantum of evidence was offered in support of the appellant's insanity defense. In other contexts, however, the Court of Criminal Appeals has held that jury instruction errors do not automatically require a reversal of a conviction. *See, e. g., Floras v. State of Oklahoma*, 896 P. 2d 558, 550, *cert. denied*, 516 U. S. 1002, 116 S. Ct. 548, 133 L. Ed. 2d 450 (1995); *Fontenot v. State of Oklahoma*, 881 P. 2d 69, 84 (Okla. Crim. App. 1994). Even when an instruction misstates the applicable law, the Oklahoma Court of Criminal Appeals does not reverse the conviction unless the error results in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right. *Fontenot*, 881 P. 2d at 85, *quoting Brown v. State of Oklahoma*, 777 P. 2d 1355, 1358 (Okla. Crim. App. 1989), *citing* Title 20 Okla. Stat. (1991) § 3001.1. The state court's response to this Court's certified question leaves no doubt that the court would apply harmless error analysis in a case involving a jury instruction error of the type described in *Johnson, supra*. The court clarified that such an error would not require reversal as a matter of Oklahoma

law where there was insufficient evidence to permit a reasonable jury to find the defendant to be insane.

Although the Petitioner's trial lawyers made a strong effort to present an insanity defense, the evidence was scant. The evidence showed that the Petitioner had been hospitalized for a few days just prior to the shootings, including one day in a hospital psychiatric ward, after he consumed a handful of non-lethal pills while in the presence of his then-fiancé, Cheryl James.[52] On the day before the shootings, the Petitioner left the hospital psychiatric ward without being properly discharged.[53] Trial testimony indicated that the Petitioner became "very upset" the night before the shootings after an altercation with Ms. James.[54] Defense counsel also offered some evidence that

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[52] Trial testimony indicated that approximately two days prior to the shootings, the Petitioner consumed some pills in Ms. James' presence, in what he characterizes as a suicide attempt. Of course, Ms. James took the Petitioner to a hospital where be received treatment. (Tr. Vol. IV, p. 155). In his taped statement to the police after the shootings, the Petitioner said that he took four different kinds of pills in this failed suicide attempt: Tylenol, Robitussin, and pills his doctor had given him for headache and dizziness. Ms. James drove the Petitioner to the hospital after he took the pills, and the Petitioner was transferred to the psychiatric ward of another hospital. The Petitioner's sister testified that when she visited him in the hospital the Petitioner was "saying strange things." (Tr. Vol. IV, p. 158).

[53] (Tr. Vol. IV, pp. 202-203, 208).

[54] After leaving the hospital, the Petitioner had a public altercation with his fiancée, during which she became frightened and sought assistance from a security guard. Later that evening, police were called to the Petitioner's apartment when his fiancée reported that he had taken her car without permission. Witnesses testified that the Petitioner was very upset that evening, and that he told the police officers he had a "lot of problems." (Tr. Vol. IV, pp. 215-217). The officers recommended that the Petitioner return to the hospital. (Tr. Vol. IV, pp.

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soon after the shootings, the Petitioner telephoned his sister, Carol Washington, and seemed "very emotional." Defense counsel also offered into evidence three audio tapes containing portions of his interview with a police detective shortly after the killings. Portions of these tapes were played for the jury.[55] On the tapes, the Petitioner is heard telling a police detective that he "really need[ed] some medical attention" to help him find out what caused him to do what he did. The Petitioner explained to the detective how he knew each of the victims, and admitted shooting each of them. The Petitioner told the detective about his on-the-job injury and his ongoing dispute with his employer over worker's compensation benefits, and about his dispute with Cheryl James over his checkbook. (Defendant's Exhibit 1, Tape II). The Petitioner then described each of the shootings to the detective in detail, claiming that it "seemed like" someone was telling him what to do, and that it seemed like something had overtaken

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217-218). While the police were present, the Petitioner's sister, Diana Jones, arrived. Ms. Jones testified that the Petitioner was crying that night, that he was non-communicative and motionless, and that he appeared "lost, like star gazing." (Tr. Vol. IV, pp. 158-161). Ms. Jones stayed with the Petitioner until approximately 2:00 a. m., approximately four hours before the shooting rampage began. While she was there, the staff at St. Anthony's psychiatric ward telephoned and asked the Petitioner to come back. (Tr. Vol. IV, pp. 163-164). The Petitioner reportedly told the officers that he just wanted to go to Memphis to see his mama. (Tr. Vol. IV, p. 215).

[55] It appears from the record that the first tape malfunctioned and did not record. Although it is not entirely clear from the transcript, it appears that the second and third tapes were played for the jury in their entirety. (Tr. Vol. IV, pp. 235-238).

him.[56] (Defendant's Exhibit 1, Tape III). It is not clear from the trial record which portions of the tapes were played for the jury.

While this evidence may have some tendency to show that the Petitioner had some emotional or mental problems, it does not establish that the Petitioner fell within either prong of the legal definition of insanity at the time of the shootings. Viewed in its most favorable light, the Petitioner's evidence does not establish that either his alleged head injury, his emotional state, or any mental illness from which he suffered at the time of the shootings were so severe as to prevent him from understanding the nature and consequences of his acts, or from knowing that they were wrong. Under the first M'Naghten prong, the Petitioner has not shown that he was psychotic to a degree which would prevent him from knowing the nature and quality of his acts. With regard to the second prong, the Petitioner has failed to show that because of his mental condition, he did not know that what he was doing was wrong. The evidence was clearly not sufficient to enable a reasonable jury to find the Petitioner to be not guilty by

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[56] The Petitioner told the interviewer that on the morning of the shootings, he first considered taking his own life, then decided to return to the mental ward. He said that as he was driving his car, he encountered Cheryl James and Robert Dumas, and attempted to stop them to retrieve his checkbook. The Petitioner said that when they sped away from him, he became afraid. "Before [he] knew it," the Petitioner had pulled out his gun and shot at Dumas' car. After that, the Petitioner said, he "wasn't thinking." It seemed to him that "someone" was telling him what to do, and that "something" had taken over him. (Defendant's Exhibit 1, Tape III).

reason of insanity.[57] *See* OUJI-CR 729 (1981). To the contrary, the evidence showed beyond any reasonable doubt that the Petitioner knew and understood what he was doing, and that he engaged in a considerable amount of planning and premeditation.

Because the Petitioner's evidence at trial was not sufficient to permit a jury to find him not guilty by reason of insanity, the Court concludes that the state appellate court would not have reversed his convictions and sentences based on the error in the jury instruction defining insanity. *See Ellis v. Ward*, 2000 WL 1486657 (Okla. Crim. App. 2000); Title 20, Okla. Stat. § 3001.1 (Under Oklahoma law, a conviction and sentence will not be set aside based on an incorrect jury instruction unless "it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right);" *Fontenot v. State of Oklahoma*, 881 P. 2d 69 (Okla. Crim. App. 1994). *See also United States v. Cook*, 45 F. 3d 388, 392-393 (10th Cir. 1995). Thus, upon careful review, the Court concludes that the Petitioner has not shown that appellate counsel's failure to challenge the instruction rendered his representation ineffective. Accordingly, the Petitioner has not met the necessary showing of cause and prejudice, and his claim of error in the insanity instruction is procedurally defaulted. For the same reasons, the Petitioner's claim of ineffective assistance of counsel fails on its merits. The Petitioner is not entitled to habeas corpus relief on this claim. *Accord*,

[57] The evidence in support of the Petitioner's claim of insanity is described in its most favorable light in footnote 4 above.

Calderon v. Coleman, 525 U. S. 141, 119 S. Ct. 500 (1998) (It was error to grant habeas corpus relief based upon an inaccurate jury instruction without first applying the harmless error standard).[58]

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[58] The Court further observes that, in deciding whether the instruction error has "probably resulted in a miscarriage of justice," or whether it constitutes a substantial violation of a constitutional or statutory right, it must consider the erroneous instruction in the context of the jury instructions as a whole. A review of the challenged instruction reveals that despite its error, it also contained a correct statement of the test for insanity. The instruction correctly admonished the jury that although the law presumes every person to be sane, it is "an essential ingredient of a crime that a person, to be guilty of such crime, must have at the time of its commission sufficient mental capacity and reason to enable him to distinguish right and wrong as applied to the particular act that he is then about to do." The instruction continued: "It is essential, further, that such person know and understand the nature and consequences of his act and that he know that if he does commit such act he will do wrong and subject himself to punishment." (Instruction No. 18). Thus, despite the erroneous use of the word "and" in a subsequent sentence, the challenged instruction did, at least, inform the jury that both elements of mental capacity were "essential" to a finding of guilt. The Court's other instructions as a whole likewise explained to the jury the mental state required for a conviction. For example, the jury was instructed that a conviction for first degree murder required a finding that the defendant acted with "malice aforethought," which term was defined as a "deliberate intention to take away the life of a human being." (Instruction No. 10). The jury was further instructed that they were to consider external circumstances in deciding whether "deliberate intent existed in the mind of a defendant to take a human life." (Instruction No. 11). This instruction further provides: "External circumstances include words, conduct, demeanor, motive, and all other circumstances connected with a homicidal act." Thus, although imperfect, the jury instructions as a whole adequately informed the jury of the requisite mental state required for a conviction.

Ground Seven:

Inability to Present Insanity Defense

The Petitioner next argues that he was prevented from presenting evidence in support of his insanity defense to the jury. The Petitioner asserts that since his attorneys "virtually conceded" on voir dire that he had committed the acts charged,[59] his only defense was that at the time of the shootings he was either insane or incapable of forming the intent to kill. The Petitioner complains that he was prevented from presenting such a defense when the trial court excluded the medical report of R. D. Garcia, M.D., a forensic psychiatrist. The Petitioner argues that this evidentiary ruling was made even more prejudicial when the prosecuting attorney made several remarks about the absence of any psychiatric evidence to support his insanity defense.

The record indicates that the trial court ordered the Petitioner to be transported to Eastern State Hospital in Vinita, Oklahoma for a psychological evaluation prior to his trial. Over a period of twenty-eight days, the Petitioner was observed by hospital staff and underwent diagnostic tests. Dr. Garcia, the hospital's chief forensic psychiatrist, rendered a final diagnosis of "schizophrenia, paranoid type, chronic, in complete remission." The treatment team's diagnosis was the same. By the time of the trial, Dr. Garcia had died. (Tr. Vol. IV, p. 256). In the report the

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[59] Tr. Vol. II, p. 139. Of course, the Petitioner's attorneys could hardly have denied that he committed the crimes under the circumstances. There was overwhelming evidence establishing the Petitioner's guilt, including his own detailed confession to the police on the day of the crimes.

Petitioner attempted to introduce at trial, Dr. Garcia and other members of the hospital staff expressed the opinion that the Petitioner was competent to stand trial. Dr. Garcia's report does not include an opinion on whether the Petitioner was legally insane or otherwise mentally impaired at the time of the crimes.

Claims of error based on evidentiary rulings are maters [sic] of state law which are generally not cognizable in federal habeas corpus proceedings. *See Gerlaught v. Stewart*, 129 F. 3d 1027, 1032 (9th Cir. 1997), *cert. denied*, 525 U. S. 903, 119 S. Ct. 237, 142 L. Ed. 2d 195 (1998); *Gonzalez v. DeTella*, 127 F. 3d 619, 621 (7th Cir. 1997), *cert. denied*, 523 U. S. 1032, 118 S. Ct. 1325, 140 L. Ed. 2d 487 (1998); *Hatley v. Lockhart*, 990 F. 2d 1070, 1073 (8th Cir. 1993). *See also Estelle v. McGuire*, 502 U. S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). A state court's ruling on the admissibility of evidence may not be challenged in a federal habeas corpus proceeding unless the ruling renders the trial so fundamentally unfair as to constitute a denial of a federal constitutional right. *Duvall v. Reynolds*, 139 F. 3d 768, 787 (10th Cir.), *cert. denied*, 525 U. S. 933, 119 S. Ct. 345, 142 L. Ed. 2d 284 (1998).

At trial, defense counsel proffered Dr. Garcia's report and the records from Eastern State Hospital in support of the insanity defense. The trial court sustained the state's objection to this report and accompanying records, explaining that they were addressed to the issue of the Petitioner's competency to stand trial, which was "a different issue than [knowing] right or wrong at the time" of the acts. (Tr. IV, p. 256). In response to the trial judge's queries, defense counsel could point to no specific evidence in the report or records bearing upon whether the Petitioner knew right from wrong at the time of the acts. (Tr. IV, p. 256-257). On

the Petitioner's direct appeal, the state appellate court reiterated that: "It is well settled that the question of an accused's present competency to stand trial is an entirely different matter than the defense of insanity." 867 P. 2d at 1296, *citing Miller v. State of Oklahoma*, 751 P. 2d 733 (Okla. Crim. App. 1988). The appellate court agreed with the trial court's assessment: "Nothing in the Eastern State Hospital records was directed to the question of sanity, which is whether appellant was capable of knowing the wrongfulness of his acts when he committed them. Rather, the examination was directed solely to the question of competency, i. e., whether appellant had the ability at the time of trial to understand the nature of the charges and proceedings brought against him, and was able to effectively and rationally assist in his defense." 867 P. 2d at 1296 (*citation omitted*).

The Court agrees that Dr. Garcia's report and the Petitioner's medical records are directed to the question of the Petitioner's ability to stand trial, rather than to the issue of his sanity at the time of the crimes.[60] The Court further agrees with the state courts' findings that any probative value of the report and medical records was "outweighed by the danger of misleading the jury and

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[60] The Petitioner points out that in the trial court's order committing him for a psychiatric examination, the court directed the Department of Mental Health to determine whether the Petitioner was competent to stand trial and whether he was "competent at the time these acts were alleged to have been committed." (O. R. 17-18). It is nevertheless clear that Dr. Garcia's report and the accompanying staff notes are addressed to the issue of competency to stand trial, and not to the insanity defense. The Petitioner points to nothing in the records which addresses the issue of legal insanity.

confusing the issues of competency and sanity." 867 P. 2d at 1297. The Court further finds that the trial court's exclusion of this evidence did not render the trial so fundamentally unfair as to constitute the denial of a federal constitutional right. *See Duvall v. Reynolds*, 139 F. 3d 768, 787 (10th Cir.), *cert. denied*, 525 U. S. 933, 119 S. Ct. 345, 142 L. Ed. 2d 284 (1988); *Matthews v. Price*, 83 F. 3d 328, 331-332 (10th Cir. 1996). The Petitioner is not entitled to habeas corpus relief on this basis.

Ground Eight:

"Courtroom Theatrics" and Prosecutorial Misconduct

The Petitioner next alleges that he was deprived of a fair trial by what he describes as "inflammatory argument and actions" by the prosecutor, by courtroom outbursts by family members of some of the victims, and by the admission of highly prejudicial evidence.

A. Spectators' Outbursts and Prosecutor's Comments.

The record indicates that during the prosecutor's closing argument, there was an outburst in the back of the courtroom when the prosecutor referred to the shooting of seven-year-old Tameca Thomas. (Tr. V, p. 18). Cheryl James and an individual identified as Ms. McClary stood up and began to wail, and were quickly removed from the courtroom. The trial court immediately declared a five-minute recess, and cautioned the remaining spectators to refrain from such outbursts. Cheryl James is the aunt of Tameca Thomas and the sister of Theresa Thomas; Ms McClary is the grandmother of Tameca Thomas and the mother of Theresa Thomas.

Moments after the recess, according to the Petitioner, the prosecutor "slowly paraded in front of the jury" with the gun in his hand during the state's closing argument. Then, as he described the Petitioner's shooting of seven-year-old Tameca Thomas in graphic detail, the prosecutor allegedly bent down and "dry-fired" the gun. (Petitioner's opening brief, pp. 48).[61]

On direct appeal, the Oklahoma Court of Criminal Appeals noted that immediately after the emotional

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[61] According to the record, Assistant District Attorney John Foley made the following remarks in his closing argument:

> "Ladies and gentlemen, I submit to you that the most damaging evidence as to the intent of this man is with that little girl. We know it's 6:30, 6:40. We know Tameca is still in her nightgown. We know something has awakened her, something in the back yard. And she goes out on that back porch, and she turns and she sees Cyril Ellis down here with her mother. She hears her mother say, 'Please, please don't do this to me.' And Cyril is taking that gun, and shoots her at least two more times. I imagine, folks, that Tameca probably yelled, and he turned and saw that little girl, little seven year old girl. And he has to walk over to her. And he has this gun, and this gun is loaded. And he shoots that little girl; and he shoots her again, folks. Imagine her eyes are still open, and she is reaching up to him. Please help me .... (Objection overruled). Please, please. She can't talk, because she is falling on the step. Her lips are swollen, folks. Now what does he do at that point, folks? He shot her twice. What does he do at that point? He has to bend down. For, you see, you can't get to the bottom right here and leave powder burns unless you are bending down. He has to go down to her, her eyes still open. And what does he do at that point, folks? Does he let her go? She is bleeding.... (Objection overruled). He bends down. This big, old, tough man, bends down with that gun, and one more. You are not going to live, Tameca. Huh uh. You are not going to live."

Tr. V, pp. 32-33.

outburst by relatives of Tameca and Teresa Thomas, the trial judge sent the jury out of the courtroom. The court further found that the incident was of short duration, and that the trial judge "took appropriate measures to prevent any unfair prejudice."[62] Although the trial judge admonished the spectators, in the jury's absence, to refrain from further outbursts, he did not give a curative instruction to the jury, and none was requested. The Court of Criminal Appeals reasoned that the Petitioner's failure to request a curative instruction admonishing the jury to disregard the outburst "is his fault," and "cannot be said to be fundamental error." 867 P. 2d at 1297.

As for the prosecutor's remarks, the state Court of Criminal Appeals found that although the prosecutor "did embellish the facts" as they appeared in the record, and was "overly graphic," his remarks were "within the bounds of closing argument," and his actions "fell within the wide latitude permitted during closing argument." *Ellis*, 867 P. 2d at 1297, *citing Cervantes v. State of Oklahoma*, 556 P. 2d 622, 627 (Okla. Crim. App. 1976). The Court agrees.

Prosecutorial misconduct does not warrant federal habeas corpus relief unless the prosecutor's actions "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U. S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Prosecutors are allowed a reasonable amount of latitude in drawing inferences from the evidence presented during

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[62] Outside the presence of the jury, the trial judge admonished the spectators in the courtroom not to make any further outbursts, and that they should leave if they are unable to control such outbursts. (Tr. V, pp. 18-20).

their closing statements. *Duvall v. State of Oklahoma*, 139 F. 3d 768, 795 (10th Cir.), *cert. denied*, 525 U. S. 933, 119 S. Ct. 345, 142 L. Ed. 2d 284 (1998); *United States v. Manriquez Arbizo*, 833 F. 2d 244, 247 (10th Cir. 1987). The Court agrees with the state appellate court that although some of the prosecutor's remarks were somewhat overly dramatic, they were not outside the bounds of reasonable comment on the evidence, and did not so infect the trial as to result in a denial of due process. *Donnelly, supra.*

B. Admission of Graphic Physical Evidence.

The Petitioner also complains of the trial court's admission of the bloody blue jeans worn by Teresa Thomas.[63] The trial record indicates that the state moved for admission of the blue jeans during the testimony of the police blood spatter expert, who identified them as those worn by Theresa Thomas. The trial court admitted them over defense counsel's "unfair prejudice" objection. Rejecting defense counsel's argument that the blue jeans appeared to be "very bloody,"[64] the trial judge reasoned that they were not unduly gory or abhorrent. (Tr. IV, pp. 130-131). The Court agrees.

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[63] The Petitioner also complains of the admission of various crime scene photographs depicting blood. The Court addresses the trial court's admission of the crime scene photographs in the following section.

[64] Defense counsel objected to the admission of the blue jeans at trial on the same ground urged here, and on the additional ground of lack of foundation. The trial judge rejected defense counsel's foundation argument, noting that the medical examiner had earlier testified that she took them off of Teresa Thomas during autopsy. Tr. IV, pp. 130-131.

Federal habeas corpus relief is not ordinarily available to correct state law evidentiary errors. *See Estelle v. McGuire*, 502 U. S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Maes v. Thomas*, 46 F. 3d 979, 987 (10th Cir.), *cert. denied*, 514 U. S. 1115, 115 S. Ct. 1972, 131 L. Ed. 2d 861 (1995). To justify habeas corpus relief for an erroneous evidentiary ruling, a petitioner must demonstrate the trial court's evidentiary ruling rendered the trial "so fundamentally unfair as to constitute a denial of federal constitutional rights." *Cummings v. Evans*, 161 F. 3d 610, 618 (10th Cir. 1998), *cert. denied*, ___ U. S. ___, 119 S. Ct. 1360, 143 L. Ed. 2d 521 (1999) (*internal quotation omitted*). The Petitioner has not shown that the admission of the blue jeans at his trial so infected the proceedings that it rendered his trial fundamentally unfair.

Ground Nine:

Admission of Crime Scene Photographs

The Petitioner next complains of the trial court's admission of ten photographs of the bodies of the deceased victims and of the crime scenes, which he describes as "gruesome and irrelevant". These photographs were either excluded or withdrawn by the state during the first stage of trial upon defense counsel's objection to their admission. The trial court admitted the photographs in the second stage, after finding they were probative to show that the deaths were especially heinous, atrocious and cruel. *Ellis*, 867 P. 2d at 1299. On appeal, the state Court of Criminal Appeals found no abuse of discretion in the admission of the photographs; but also held that jury's finding that the

deaths were especially heinous, atrocious and cruel could not be sustained due to a faulty jury instruction.[65]

The Court finds that the admission of the photographs does not warrant federal habeas corpus relief. The photographs are not unduly gruesome or inflammatory, and it is apparently undisputed that they fairly depict the crime scenes. The fact that the photographs were admitted in support of the "especially heinous, atrocious and cruel" aggravator which was ultimately stricken on appeal does not render their admission fundamentally unfair. The Court does not find the state appellate court's ruling in that regard to be contrary to, or an unreasonable application of, Supreme Court precedent. Given the gruesome character of the Petitioner's crimes, and the strength of the evidence supporting the two remaining aggravators, the admission of the photographs was not so unduly prejudicial as to render the proceedings fundamentally unfair.[66] *Accord*, *Smallwood v. Gibson*, 191 F. 3d 1257

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[65] The appellate court held that the jury's finding of the aggravating circumstance of especially heinous, atrocious, or cruel could not stand because the trial court failed to give instruction limiting that circumstance to those murders in which torture or serious physical abuse preceded death. 867 P. 2d at 1301. The court nevertheless found that the two other aggravating circumstances found by the jury would support the Petitioner's death sentences, i. e., (1) Petitioner knowingly created a great risk of death to more than one person, and (2) the existence of a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. *Id.*

[66] The appellate court upheld the following aggravating circumstances: 1) The Petitioner knowingly created a great risk of death to more than one person, 21 Okla. Stat. § 701.12(2); and 2) There existed a probability that the Petitioner would commit criminal acts of violence that would constitute a continuing threat to society, 21 Okla. Stat. § 701.12(7). The seven shootings involved in this case took place at two

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(10th Cir. 1999); *Gomez v. Ahitow*, 29 F. 3d 1128, 1139 (7th Cir. 1994), *cert. denied*, 513 U. S. 1160, 115 S. Ct. 1122, 130 L. Ed. 2d 1085 (1995).

Ground Ten:

Jury Instruction Errors

The Petitioner next argues that the trial court erred in failing to give the jury the option of finding him guilty of manslaughter, and in failing to inform the jury of the

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different locations. At each shooting scene, the Petitioner shot more than one person. The Petitioner clearly intending [sic] to kill all of the seven people he shot, although only three of them died. Afterwards, the Petitioner commented to police investigators that he had not "gotten" all of the people he intended to. This evidence clearly supports the jury's finding that the Petitioner knowingly created a great risk of death to more than one person in each of the three cases. Blood spatter evidence indicates that the Petitioner originally shot Teresa Thomas inside her house, then pursued her through the house, shooting her several more times as she walked, then crawled, and eventually collapsed and died in her back yard. In his taped statement to the police, the Petitioner described Ms. Thomas' pleading for her life. The Petitioner then shot Ms. Thomas' seven-year-old daughter multiple times, leaving the child critically wounded. At his place of employment, the Petitioner singled out supervisors and managers for shooting. First, the Petitioner walked into the office of Carl Lake. The Petitioner shot Mr. Lake as he held up his hand in a defensive gesture. When Mr. Lake stumbled, then collapsed in front of the Petitioner, the Petitioner shot Mr. Lake again on the top of his head, killing him. The Petitioner then encountered Jim Rider, shooting him a total of four times. After the first two gunshot wounds, Mr. Rider attempted to go upstairs, then stumbled and fell. As the Petitioner walked past, he shot Mr. Rider in the back two more times, killing him. The Court of Criminal Appeals also noted that the state offered evidence that the Petitioner showed no remorse for the killings, and that he had acted calmly in the commission of each crime.

consequences of a verdict of not guilty by reason of insanity, citing *Beck v. Alabama*, 447 U. S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). The Petitioner argues that the trial court's failure to give these instructions was particularly prejudicial because he "never denied killing the three victims with a dangerous weapon," and instead defended on the ground of insanity and/or lack of capacity.

The Court first addresses the Petitioner's claim related to the trial court's failure to give his requested instruction on first degree manslaughter.[67] *Beck v. Alabama, supra*, held that a death sentence may not constitutionally be imposed when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, if the evidence would have supported such a verdict. 447 U. S. at 627.

The United States Court of Appeals for the Tenth Circuit has recently addressed the question of when a lesser included offense instruction is required in *Hogan v. Gibson*, 197 F. 3d 1297 (10th Cir. 1999). In *Hogan*, the Tenth Circuit explained that "when the evidence unquestionably establishes that the defendant is guilty of a

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[67] The Petitioner's requested instruction on first degree manslaughter read as follows:

> "You are further instructed that under the facts of this case, the crime of murder as heretofore defined in these instructions embraces the lesser degree of felonious homicide known as first degree manslaughter. In such cases, the statutes of this state define homicide as manslaughter in the first degree where the State has proved beyond a reasonable doubt the following: (1) the death of a human being; (2) without a planned and deliberate design to effect death; (3) by means of a dangerous weapon."

Defendant's Requested Instruction No. 12.

serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the 'third option' of convicting of a lesser included offense would seem inevitably to enhance the risk of an unwarranted [capital] conviction." *Hogan*, 197 F. 3d at 1303, *quoting Beck*, 447 U. S. at 627. In other words, the purpose of the rule is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence. *Hogan*, 197 F. 3d at 1303, *citing Spaziano v. Florida*, 468 U. S. 447, 455, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984). The Court of Criminal Appeals rejected this claim on direct appeal, finding that the evidence did not support an instruction on first degree manslaughter. *Ellis*, 867 P. 2d at 1297-1298.

Although neither *Beck* nor *Hogan* established a clear rule as to the precise quantum of evidence that would warrant an instruction on a lesser included offense, the Supreme Court in *Beck* noted that in the federal courts, it has long been beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. *Beck*, 447 U. S. at 635, *quoting Keeble v. United States*, 412 U. S. 205, 208, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973). The Tenth Circuit has since adopted and applied the same standard in considering the sufficiency of the evidence of a lesser included offense for *Beck* purposes on habeas corpus review. *Hogan, supra*, *citing Hatch v. State of Oklahoma*, 58 F. 3d 1447, 1454 (10th Cir. 1995) (denying a *Beck* claim because there was no evidence which, if believed, could reasonably have led to a verdict of guilt of a lesser offense), *cert. denied*, 517 U. S. 1235, 116 S. Ct. 1881, 135 L. Ed. 2d

176 (1996). Thus, to succeed on his claim that the trial court's failure to instruct the jury on first degree manslaughter violated *Beck*, the Petitioner must demonstrate that the evidence presented at trial would permit a rational jury to find him guilty of first degree manslaughter and acquit him of first degree murder. *Hogan, supra, citing Hopper v. Evans*, 456 U. S. 605, 610, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982).

As the Tenth Circuit stated in *Hogan*, the relevant portion of Oklahoma's first-degree manslaughter statute defines the crime as homicide "'perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon.'" Oklahoma subscribes to the minority view of first degree manslaughter in requiring both heat of passion *and* the absence of a deign to effect death. *Hogan, supra, citing* Title 12, Okla. Stat. § 711 (2) *and Brown v. State of Oklahoma*, 777 P. 2d 1355, 1358 (Okla. Crim. App. 1989). The elements of "heat of passion" under Oklahoma law are: 1) adequate provocation; 2) a passion or emotion such as fear, terror, anger, rage or resentment; 3) the homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and 4) a causal connection between the provocation, passion and homicide. *Hogan, supra, citing Charm v. State of Oklahoma*, 924 P. 2d 754, 760 (Okla. Crim. App. 1996), *cert. denied*, 520 U. S. 1200, 117 S. Ct. 1560, 137 L. Ed. 2d 707 (1997) *and Allen v. State of Oklahoma*, 821 P. 2d 371, 374 (Okla. Crim. App. 1991).

Oklahoma courts treat the statutory phrase "a design to effect death" as synonymous with intent to kill. *Hogan, supra, citing Smith v. State of Oklahoma*, 932 P. 2d 521, 532-533 (Okla. Crim. App, 1996), *cert. denied*, 521 U. S.

1124, 117 S. Ct. 2522, 138 L. Ed. 2d 1023 (1997). Thus, under Oklahoma law, even if a defendant kills in the heat of passion, the killing may not be classified as first degree manslaughter if the defendant intended death to result from the act. Accordingly, a defendant is entitled to a manslaughter instruction only if the evidence at trial would allow a jury to rationally conclude that the defendant's rage rendered him or her incapable of forming a design to effect death. *Hogan, supra, citing Allen v. State of Oklahoma*, 821 P. 2d at 374.

In this case, unlike *Hogan*, the Court of Criminal Appeals considered what, if any, evidence might support the Petitioner's theory of manslaughter. The court noted that each of the three homicide victims in this case had been shot multiple times, with at least one wound to the head. *Ellis I*, 867 P. 2d at 1297. The Petitioner had to reload his handgun before each killing, and had to drive to various locations in pursuit of his victims. The Petitioner pursued one victim, Teresa Thomas, through her house and outside the back door as she walked, stumbled, then crawled, in an effort to escape him, continuing to shoot even after she pleaded for her life. He prefaced the shooting of Carl Lake by telling Mr. Lake that he was going to blow his head off. *Ellis I*, 867 P. 2d at 1298; Tr. III, pp. 165-166. The record further indicates that the entire shooting spree took approximately an hour and a half, including travel time.

The Petitioner has made no attempt to identify specific evidence in support of his requested manslaughter instruction, although evidence was offered at trial of a dispute with Cheryl James and a confrontation with police the evening before the shootings. The record also includes some evidence that the Petitioner had a dispute with his

employer over disability benefits several weeks prior to the shootings, and that his job performance had been criticized by his supervisors. None of these incidents or disputes has been shown to be particularly rancorous, and most of them occurred weeks before the shootings. These incidents cannot rationally be considered "adequate provocation" for the Petitioner's killing of Teresa Thomas, Carl Lake and James Rider. Nor has it been shown that the Petitioner acted out of extreme passion or emotion, such as fear, terror, anger, rage or resentment at the time of the shootings, Although the Petitioner was allegedly "very upset" when he spoke with police officers about Ms. James' car the night of January 29, 1986, the shootings occurred a number of hours after this incident, long after any passion or emotion had a reasonable opportunity to abate.[68] Furthermore, the evidence at trial indicated that the Petitioner had already acquired the gun and purchased the ammunition when the confrontation with the police occurred. The Petitioner reportedly seemed "okay" and was not angry when he went to the Otasco store and borrowed the gun and purchased the ammunition. Contrary to the Petitioner's suggestion, numerous witnesses testified at trial that the Petitioner appeared "calm" or "cool" or "normal" on the morning of the shootings.[69]

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[68] The evidence indicated that Ms. James telephoned police after the Petitioner drove away in her car. When police officers arrived at the Petitioner's apartment to question him, the Petitioner initially refused to speak to them, The Petitioner allowed the officers into his apartment when his sister arrived.

[69] The Petitioner's neighbor, Allen Mitchell, testified that as the Petitioner was leaving his house the morning of the shootings, he had to help the Petitioner start his car. Mr. Mitchell testified that the

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In summary, the evidence can only be interpreted as showing a deliberate intent by the Petitioner to effect death. *Hogan, supra, citing Charm v. State of Oklahoma*, 924 P. 2d 754, 760 (Okla. Crim. App. 1996), *cert. denied,* 520 U. S. 1200, 117 S. Ct. 1560, 137 L. Ed. 2d 707 (1997), *and Allen v. State of Oklahoma*, 821 P. 2d 371, 374 (Okla. Crim. App. 1991). No factfinder viewing the evidence could rationally conclude that rage or heat of passion rendered the Petitioner incapable of forming a design to effect death. Thus, the refusal of a manslaughter instruction was proper.

The Court likewise rejects the Petitioner's claim that the trial court should have instructed the jury on the consequences of a verdict of not guilty by reason of insanity. The Petitioner has not shown that the proposed instruction on the consequences of a verdict of not guilty by reason of insanity was appropriate under state law, or that the failure to give it rendered the trial fundamentally unfair. *Accord, Lujan v. Tansy*, 2 F. 3d 1031 (10th Cir. 1993) (Failure to instruct the jury on consequences of

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Petitioner seemed to be "kind of anxious" and "in a hurry," but that he did not seem to be angry. (Tr. III, p. 36). Robert Dumas, one of the Petitioner's surviving victims, testified that when the Petitioner shot him, the Petitioner spoke in a calm voice and did not appear to be angry. (Tr. III, pp. 54-55). Gordon Moore, another surviving victim, testified that although the Petitioner swore at him, the Petitioner did not appear to be angry. (Tr. III, pp. 124, 135). Hazel Lynn testified that the Petitioner's demeanor seemed "normal" at the time of the shootings at Consolidated Freightways, although the Petitioner used a "demanding" tone of voice. According to Ms. Lynn, the Petitioner appeared "very calm" and in control of his senses, and did not appear to be angry. (R. III, pp. 152-154). James Lowe of Consolidated Freightways likewise testified that the Petitioner appeared "calm, cool, collected" at the time of the shootings. (Tr. III, p. 221).

rendering verdict of not guilty by reason of insanity in New Mexico first-degree murder case did not violate due process), *cert. denied*, 510 U. S. 1120, 114 S. Ct. 1074, 127 L. Ed. 2d 392 (1994). The Petitioner is not entitled to habeas corpus relief on this basis. *See also Thomsen v. State of Oklahoma*, 582 P. 2d 829, 832 (Okla. Crim. App. 1978) (In a first degree murder prosecution, the trial court did not err in refusing to instruct the jury that, if found to be not guilty by reason of insanity, the defendant might be committed to state institution for the insane); *overruled on other grounds, Brown v. State of Oklahoma*, 871 P. 2d 56 (Okla. Crim. App. 1994). Under Oklahoma law, the statute providing for possible commitment following acquittal by reason of insanity, presently codified as Title 22 Okla. Stat. (1981) § 1161, "is merely a procedural statement of disposition subsequent to the verdict and is immaterial to the process of rendering a verdict concerning the sanity of the accused." *Thomsen, supra; Boutwell v. State of Oklahoma*, 659 P. 2d 322 (Okla. Crim. App. 1983); *Lambert v. State of Oklahoma*, 888 P. 2d 494, 503 (Okla. Crim. App. 1994).

The state Court of Criminal Appeals' finding that the evidence did not support the requested manslaughter instruction was not based on an unreasonable application of the facts in light of the evidence presented at trial, and its conclusion that the instruction was properly refused was not contrary to, and did not involve an unreasonable application of, clearly established federal law as defined by the Supreme Court of the United States. The Petitioner is not entitled to habeas corpus relief based on the refusal of his proposed instructions.

Ground Eleven:

Insanity Instruction – Burden of Proof

The Petitioner's eleventh claim for relief asserts that the trial court's instruction on the insanity defense improperly placed an evidentiary burden upon the defense,[70] and that Oklahoma's uniform instruction 730 should have been given instead. The Petitioner argues that the instruction given required him to raise a reasonable doubt as to his sanity, thereby imposing upon him a burden of persuasion, *citing Mullaney v. Wilbur,* 421 U. S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). The state Court of Criminal Appeals rejected this argument on direct appeal, citing *Morris v. State of Oklahoma*, 766 P. 2d 1388, 1390 (Okla. Crim. App. 1988).

In light of *Morris, supra*, the Court finds that the instruction given at Petitioner's trial, which in effect required him to raise a reasonable doubt as to sanity before shifting the ultimate burden of persuasion to the

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[70] The trial court's instruction read, in part, as follows:

> "You are further instructed in this regard that when the plea of insanity is interposed, the burden is on the Defendant to introduce sufficient evidence to raise in the minds of the jury a reasonable doubt of the Defendant's sanity at the time of the commission of the acts in question. It is not required that the Defendant shall prove such insanity to the satisfaction of the jury beyond a reasonable doubt. It is sufficient if only he introduces sufficient evidence to raise in the minds of the jury a reasonable doubt of his sanity at the time of the act, and when this is done the burden of proof is on the state to prove the sanity of the Defendant by competent evidence, beyond a reasonable doubt, before the jury would be justified in convicting the Defendant."

Trial court's Instruction No. 18.

state, fairly and accurately represented Oklahoma law. The particular uniform instruction the Petitioner proposed to give at his trial had previously been held not to accurately state applicable Oklahoma law. *See Morris*, 766 P. 2d 1388, 1390, *citing Brewer v. State of Oklahoma*, 718 P. 2d 354 (Okla. Crim. App.), *cert. denied*, 479 U. S. 871, 107 S. Ct. 245, 93 L. Ed. 2d 169 (1986).

In *Leland v. State of Oregon*, 343 U. S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952), the Supreme Court held that requiring the defendant to prove insanity beyond a reasonable doubt was not an impermissible shifting of the burden of proof, and did not offend traditional notions of due process. *See also Thompson v. Dixon*, 987 F. 2d 1038 (4th Cir. 1993). The instruction given in the Petitioner's case was far less burdensome to the defense, requiring only that the Petitioner offer sufficient evidence to raise a reasonable doubt as to sanity before imposing upon the state the ultimate burden of proof. The Petitioner cites *Mullaney v. Wilbur*, 421 U. S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), in which the Supreme Court held that under Maine law, the burden could not constitutionally be placed on the defendant of proving by a preponderance of the evidence that the killing had occurred in the heat of passion on sudden provocation. Since that time, the Supreme Court has made it clear that it remains constitutional, under the rule of *Leland, supra*, to burden the defendant with proving his insanity defense. *Patterson v. New York*, 432 U. S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), *citing Rivera v. Delaware*, 429 U. S. 877, 97 S. Ct. 226, 50 L. Ed. 2d 160 (1976). The jury was clearly and properly instructed that the burden of proof remained at all times with the State to prove every element of the

crimes charged beyond a reasonable doubt. The Petitioner is not entitled to habeas corpus relief on this ground.

Ground Twelve:

Testimony of Michael Deloney

The Petitioner next argues that he was deprived of due process and a reliable sentencing determination when the trial court permitted the state to present the testimony of Michael Deloney in the sentencing phase. According to the Petitioner, the night before the three-day trial began, the assistant district attorney telephoned defense counsel to advise him that Michael Deloney would be testifying in the sentencing stage of the trial.

The record indicates that just before the second stage of trial began, defense counsel advised the trial court of his objection to the proposed testimony of Michael Deloney. (Tr. Vol. V, p. 45). Counsel advised the court that he had been informed the night before the trial began that the state planned to call Mr. Deloney, a former co-worker of the Petitioner, to testify concerning a statement the Petitioner had allegedly made a year and a half prior to the shootings.[71] Defense counsel objected to Mr. Deloney's testimony based on inadequate notice, arguing that the defendant's motion for pretrial discovery included a request for any admissions by the defendant, and that the

[71] According to the Petitioner's trial counsel, Mr. Deloney was an employee at Consolidated Freightways. Counsel anticipated that Mr. Deloney would testify that in approximately June, 1984, the petitioner made a statement to the effect of: "They don't know who they are messing with" or "They don't know what I'll do." (Tr. V, p. 45).

state had failed to produce Mr. Deloney's statement until the evening before the trial began. (Tr. Vol. V, pp. 45-46). According to the record, defense counsel first learned that Mr. Deloney would testify on Sunday, October 26, 1986. Mr. Deloney was available to be interviewed by defense counsel throughout the trial, and finally testified on November 3, 1986. Thus, defense counsel had several days in which to interview Mr. Deloney and to prepare for his testimony. Defense counsel was permitted to confer with Mr. Deloney in chambers prior to his testimony, and was able to thoroughly cross examine him. Mr. Deloney's testimony was very limited in scope, did not involve highly technical or complex matters, and was not critical either to the defense or to the prosecution.[72]

The Respondent first argues that this issue was not properly raised in the state court proceedings as a constitutional claim. In his brief on direct appeal, the Petitioner

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[72] Mr. Deloney's testimony, including cross examination and redirect examination, occupies approximately four pages of the five-volume transcript. Mr. Deloney testified that he was a dockman and driver for Consolidated Freightways, and that he knew the Petitioner. Mr. Deloney testified that in July or August of 1984, he and the Petitioner were driving in a tractor on the company freight yard when the Petitioner stated that: "These people just don't know, messing with me, because they just don't know what I'll do to them." Mr. Deloney testified that he did not question the Petitioner about the statement, and that he thought the petitioner was just a little nervous at the time because a manager was staring at him. (Tr. V, pp. 76-77). He did not know whether the Petitioner's statement had anything to do with the Petitioner flunking his driving test. Mr. Deloney acknowledged that the Petitioner was nice to him, and that he had never heard the Petitioner curse. (Tr. V, p. 78). Mr. Deloney acknowledged having said that the Petitioner didn't seem to be mad when he made the statement, and that he didn't take the statement seriously. (Tr. V, pp. 78-79).

based his challenge to Mr. Deloney's testimony on a provision of the Oklahoma Constitution requiring the state to provide capital defendants with a list of witnesses at least two days before the case is called for trial, and a state statute which limits aggravation evidence to that which the state has made known to the defendant prior to trial. (See Appellant's Original Brief filed in the Oklahoma Court of Criminal Appeals on July 21, 1988, pp. 45-46, citing Okla. Const. art. 2, § 20; Title 21, Okla. Stat. § 701.10). The Petitioner's appellate brief also alluded to due process-based notice principles in general terms. (See Appellant's Original Brief at p. 46, citing *Satterwhite v. Texas*, 486 U. S. 249, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988).

Regardless of whether the constitutional issue urged here was properly presented to the state courts, this Court must deny relief. Claims regarding state court evidentiary rulings are generally not cognizable in federal habeas corpus proceedings because they are matters of state law. *Gerlaught v. Stewart*, 129 F. 3d 1027 (9th Cir. 1997), *cert. denied*, 525 U. S. 903, 119 S. Ct. 237, 142 L. Ed. 2d 195 (1998). Rulings on the admissibility of evidence by a state court are not subject to federal habeas corpus review unless such ruling renders the trial so fundamentally unfair as to constitute a denial of a federal constitutional right. *Duvall v. Reynolds*, 139 F. 3d 768 (10th Cir. 1998), *cert. denied*, 525 U. S. 933, 119 S. Ct. 345, 142 L. Ed. 2d 284 (1998). The Petitioner has not demonstrated such fundamental unfairness in this case, and is not entitled to habeas corpus relief on this ground.

Ground Thirteen:

Continuing Threat Aggravator

The Petitioner next argues that the trial court erred in its application of the continuing threat aggravating circumstance, and that this statutory aggravator is unconstitutionally vague. A vagueness review should be "quite deferential." *United States v. McCullah*, 76 F. 3d 1087, 1110 (10th Cir. 1996), *reh'g denied*, 87 F. 3d 1136 (10th Cir. 1996), *cert. denied*, 520 U. S. 1213, 117 S. Ct. 1699, 137 L. Ed. 2d 825 (1997). The Tenth Circuit has upheld the constitutional validity of Oklahoma's continuing threat aggravator, holding that it is neither unconstitutionally vague nor overbroad. *See Nguyen v. State of Oklahoma*, 131 F. 3d 1340 (10th Cir. 1997), *cert. denied*, 525 U. S. 852, 119 S. Ct. 128, 142 L. Ed. 2d 609 (1998); *Castro v. Ward*, 138 F. 3d 810 (10th Cir. 1998), *cert. denied*, 525 U. S. 971, 119 S. Ct. 422, 142 L. Ed. 2d 343 (1998); *Hooks v. Ward*, 184 F. 3d 1206 (10th Cir. 1999); *LaFevers v. Gibson*, 182 F. 3d 705 (10th Cir. 1999).

The Petitioner also contends that the trial court erred in refusing his requested instruction on the continuing threat aggravator. The Petitioner complains that the jury was instructed in the "bare statutory language" of this aggravating circumstance, and was not given instructions which limited or defined the statutory language. (O. R. 139, 140, 141). The Petitioner's challenge to the instructions on the continuing threat aggravator is, essentially, a restatement of his argument that the aggravator is unconstitutionally vague and overbroad. This argument is similar to the district court's analysis in *Williamson v. Reynolds*, 904 F. Supp. 1529 (E. D. Okla. 1995), which the Tenth Circuit has now clearly rejected. *See Nguyen, supra*; *Castro, supra*. The fact that the instructions given left the

jury wide discretion to make a predictive judgment about the Petitioner's probable future conduct does not render his sentence unconstitutional. *Nguyen*, 131 F. 3d at 1354. The Court finds that the instructions given at the Petitioner's trial adequately informed the jury that the continuing threat aggravator required proof of "the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Ample evidence was offered in support of this aggravator.[73] The Petitioner is not entitled to habeas corpus relief on this ground.

Ground Fourteen:

Refusal to Admit Evidence of Parole Board Policies

The Petitioner's trial counsel attempted to present testimony from Betsy Payne, then Executive Director of the Oklahoma Pardon and Parole Board, on the Board's parole policies, during the sentencing phase of trial. (Tr. V, pp. 47-48, 83-84). According to counsel, Ms. Payne was prepared to testify, based on her experience and observation, that a person sentenced to life on a first degree murder conviction would not be considered for parole for at least fifteen years. (Tr. V, p. 47). Further, Ms. Payne would have testified that a person given three life

[73] Evidence was offered at trial that the Petitioner made earlier threats of bodily harm against various co-workers on multiple occasions prior to the murders for which he was sentenced. The evidence was undisputed that the Petitioner shot and killed three people, that he shot and injured four other people, and that he shot at and terrorized still other people, all without provocation.

sentences would be unlikely to be considered for parole for at least 45 years. The trial court excluded this evidence.

As his Fourteenth ground for relief, the Petitioner argues that by excluding this evidence, the trial court failed to "fully and accurately" inform the jury of its sentencing options, in violation of the Eighth and Fourteenth Amendments, *citing Simmoms v. South Carolina*, 512 U. S. 154, 114 S. Ct. 2187, 129 L. Ed. 133 (1994). In *Simmons*, the Supreme Court held that where the state had placed the defendant's future dangerousness at issue, the state violated the defendant's due process rights by refusing to instruct the jury that, as an alternative to the death penalty, a sentence of life imprisonment carried with it no possibility of parole. 512 U. S. at 156. Subsequently, in *Ramdass v. Angelone*, ___ U.S. ___, 120 S. Ct. 2113, 147 L. Ed. 2d 125 (2000), the Supreme Court held that a parole-ineligibility instruction is required in a capital case under *Simmons* only when, assuming that the jury fixes the sentence at life, the defendant would be ineligible for parole under state law. Here, unlike *Simmons*, the applicable state statute in effect at the time of trial did not prohibit release on parole. As the Fifth Circuit explained in *Allridge v. Scott*, 41 F. 3d 213 (5th Cir. 1994), *cert. denied*, 514 U. S. 1108, 115 S. Ct. 1959, 131 L. Ed. 2d 851 (1995), legal ineligibility for parole is a matter of law, whereas the probability of parole presents a question of fact. Because evidence of the likelihood of parole at some point in the future is, by nature, purely speculative, state courts may legitimately choose to exclude such evidence. *Allridge*, 41 F. 3d at 222. *See Ingram v. Zant*, 26 F. 3d 1047, 1054 n. 5 (11th Cir. 1994), *reh'g denied*, 36 F. 3d 96 (11th Cir. 1994), *cert. denied*, 513 U. S. 1167, 115 S. Ct. 1137, 130 L. Ed. 2d 1097 (1995); *Roach v. Angelone*, 176 F.

3d 210 (4th Cir.) (Petitioner was not entitled to habeas corpus relief based on state court's refusal to instruct jury that, if sentenced to life imprisonment, he would not become eligible for parole for a minimum of 25 years), *cert. denied*, ___ U. S. ___, 120 S. Ct. 401, 145 L. Ed. 2d 313 (1999). *See also Moore v. Reynolds*, 153 F. 3d 1086 (10th Cir. 1998) (Supreme Court's *Simmons* decision, holding that a capital defendant must be permitted to inform his sentencing jury that he is parole-ineligible if the prosecution argues that he presents a future danger, represented a new rule which could not be relied upon to disturb habeas petitioner's death sentence that became final prior to *Simmons*), *cert. denied*, 526 U. S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 362 (1999). The Oklahoma Court of Criminal Appeals has consistently held that evidence concerning the likelihood of release on parole is inadmissible. *Walker v. State of Oklahoma*, 723 P. 2d 273, 280 (Okla. Crim. App. 1986); *Baston v. State of Oklahoma,* 724 P. 2d 253, 254 (Okla. Crim. App. 1986); *Banks v. State of Oklahoma,* 701 P. 2d 418, 424 (Okla. Crim. App. 1985); *Webb v. State of Oklahoma*, 546 P. 2d 642, 644 (Okla. Crim. App. 1976). Federal courts will not lightly second-guess the state's decision whether or not to inform a jury of the possibility of parole. *Simmons*, 512 U. S. at 168, *citing California v. Ramos*, 463 U. S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983). The Petitioner is not entitled to habeas corpus relief on this ground.

The Petitioner quotes three newspaper articles and two editorials in which the issue of parole is mentioned.[74]

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[74] One article, published after a defendant was sentenced to life imprisonment after killing a police officer, quotes the District Attorney

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The Petitioner offers no evidence suggesting that any of the members of his jury had actually read any of these articles or editorials, some of which were published long before his trial, including one which was published more than four years before the trial. The Petitioner has not shown that his trial was adversely affected by any of the articles or editorials. The Petitioner is not entitled to habeas corpus relief on this ground.

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as predicting that the killer would be "out in eight to ten years killing again." The victim's widow was also quoted as expressing disappointment that her husband's killer would spend 7½ years in prison. This article was published ten months before the Petitioner's trial. In the second article, a police detective was quoted as saying that he was "highly disturbed" after a life sentence was returned in another case because "many people who receive life terms are paroled in seven or eight years." The victim's brother was quoted in that article as saying that "[l]ife imprisonment doesn't mean that much anymore." This article was published two months before the Petitioner's trial. In the third article, a Department of Corrections official attempted to explain the difficulty of giving a statistical average length of time served by prisoners sentenced to life imprisonment. This article was published four and one half years before the Petitioner's trial. The Petitioner also cites two editorials addressing the issue of parole. The first editorial generally expresses the sentiment that convicted criminals should serve a greater portion of their sentences before being considered for parole, and does not address the issue of life sentences. This editorial was published four and one half years before the Petitioner's trial. The second editorial expresses support for a proposed state constitutional amendment creating a sentence of life imprisonment without the possibility of parole, and criticizes unnamed "misguided appellate judges" for "thwarting executions by overturning death verdicts." This article was published approximately nine months prior to the Petitioner's trial.

Ground Fifteen

Sympathy Instruction

The Petitioner next claims that the jury was prevented from considering mitigating evidence evoking sympathy by the trial court's anti-sympathy instruction. The trial record indicates that the jury was cautioned against being guided by sympathy in the first stage of the trial.[75] In the second phase, the jury was instructed, in general terms, that the first phase instructions were to be used "where appropriate." The Petitioner acknowledges, however, that the jury was also instructed in detail on certain specific mitigating factors it could consider, including some which were clearly deigned to evoke sympathy for the Petitioner.[76] The jury was also instructed that it could consider any additional mitigating circumstances it might find from the evidence.

As noted by the Oklahoma Court of Criminal Appeals in the Petitioner's direct appeal, the Supreme Court has

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[75] In the first stage, the jury was instructed:

> "You should not let sympathy, sentiment, or prejudice enter into your deliberations but should discharge your duties as jurors impartially, conscientiously, and faithfully."

In the second stage, the jury was instructed:

> "All the previous instructions given you in the first part of this trial apply where appropriate and must be considered together with these additional instructions."

O. R. pp. 130, 151.

[76] For example, the jury was instructed that the Petitioner has a family that loves and cares about him, that he once helped to save the life of a young woman, that he had served as a volunteer with the Juvenile Bureau, that he suffered from mental illness, and that he had worked in his church in several capacities. (O. R. pp. 149-150).

approved a similar anti-sympathy instruction, given in the penalty phase of a capital trial, in *Saffle v. Parks*, 494 U. S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990). *See also Smallwood v. Gibson*, 191 F. 3d 1257, 1272-1273 (10th Cir. 1999); *Davis v. Maynard*, 911 F. 2d 415 (10th Cir. 1990). The Supreme Court has recognized that such an instruction is directed at eliminating "emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." *California v. Brown*, 497 U. S. 538, 542, 107 S. Ct. 837, 840, 93 L. Ed. 2d 934 (1987). In this case, it is clear that the instruction, given in the first phase and incorporated into the second phase, was aimed as much at restraining the jury from reacting emotionally out of sympathy for the victims as any sympathy for the Petitioner.[77] The use of this instruction was not fundamental error, and the Petitioner is not entitled to habeas corpus relief on this basis.

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[77] Arguing that the anti-sympathy instruction worked against him, the Petitioner apparently assumes that the jury's "sympathies" would have favored him. The Court is unpersuaded. The Petitioner's victims included a small child and her young mother. The surviving victims involved in the Petitioner's trial included three wounded adults and a critically wounded, seven-year-old girl who took the witness stand and described the killing of her mother in the compelling language of a small child. Three adults were shot to death, including a young mother who pleaded for her life. Relatives of one of the victims had a brief, emotional outburst at one point during the trial. It is clearly appropriate to admonish the jury against a sympathetic or emotional reaction to the evidence in such a case.

Ground Sixteen:

Failure to Instruct on Option of Life Sentence

The Petitioner next complains that the trial court failed to instruct the jury that it retained the option of returning a verdict of life imprisonment regardless of its findings as to aggravating or mitigating circumstances. The state appellate court rejected this claim on direct appeal. *Ellis I*, 867 P. 2d at 1300.

This issue was addressed by the United States Court of Appeals for the Tenth Circuit in *Duvall v. Reynolds*, 139 F. 3d 768 (10th Cir.), *cert. denied*, 525 U. S. 933, 119 S. Ct. 345, 142 L. Ed. 2d 284 (1998). There the Court observed that "[u]nder Oklahoma law, a jury is free to decline to impose the death penalty even if it finds that the aggravating circumstances outweigh the mitigating circumstances." *Duvall*, 139 F. 3d at 789-790, *citing Burrows v. State of Oklahoma*, 640 P. 2d 533, 544 (Okla. Crim. App. 1982), *cert. denied*, 460 U. S. 1011, 103 S. Ct. 1250, 75 L. Ed. 2d 480 (1983). Nevertheless, the court explained, the Constitution does not demand that the state affirmatively structure in a particular way the manner in which juries consider mitigating evidence. *Duvall*, 139 F. 3d at 790, *quoting Buchanan v. Angelone*, 522 U. S. 269, 118 S. Ct. 757, 761, 139 L. Ed. 2d 702 (1998). *See also Fox v. Ward*, 200 F. 3d 1286, 1300-1301 (10th Cir. 2000). Instead, the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. The standard for determining whether jury instructions satisfy these principles is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of relevant evidence." *Duvall*, 139 F. 3d at 790, *quoting Boyde v.*

California, 494 U. S. 370, 380, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316 (1990).

The aggravating circumstance instruction given in the Petitioner's trial was substantially identical to the instruction at issue in *Duvall*. Instruction No. 11 in the Petitioner's case read:

> "Should you unanimously find that any aggravating circumstance existed beyond a reasonable doubt, you would be authorized to consider imposing a sentence of death. If you do not unanimously find beyond a reasonable doubt that any aggravating circumstance existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life."

O. R. p. 143. The Court concludes that this instruction adequately afforded the jury an opportunity to consider mitigating evidence, and that no reasonable juror would have understood it to prevent the consideration of mitigating circumstances. The Petitioner is not entitled to habeas corpus relief on this ground.

Ground Seventeen:

Failure to Instruct Jury on Option of Life Imprisonment

The Petitioner next complains of the trial court's failure to give his proffered instructions admonishing the jury that it must find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances before it could impose a sentence of death. The Oklahoma Court of Criminal Appeals rejected this claim on direct appeal, citing *Zant v. Stephens*, 462 U. S.

862, 890, 103 S. Ct. 2733, 2749, 77 L. Ed. 2d 235 (1983). In *Zant*, the Supreme Court held that "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required."

The Petitioner's jury was adequately instructed that the State bore the burden of proving any aggravating circumstances beyond a reasonable doubt. (O. R., p. 145). The Petitioner's argument is without merit. *See also Smallwood v. State of Oklahoma*, 191 F. 3d 1257, 1271 (10th Cir. 1999) (Rejecting claim that jury instructions must expressly state that aggravating factors must outweigh mitigating factors beyond a reasonable doubt in order for the jury to impose the death penalty), *cert. denied*, 2000 WL 625676 (2000).

Ground Eighteen:

Admission of Unadjudicated Offenses.

The Petitioner next challenges the trial court's admission of evidence of prior offenses to support the continuing threat aggravating circumstance. In the sentencing phase of trial, the state called three men who had worked with the Petitioner at his previous job. The three men testified about a violent assault that the Petitioner committed upon a co-worker in January 1984, approximately two years before the crimes for which the Petitioner was tried.[78]

[78] John Wagner testified about an incident that occurred in January 1984, when he and the Petitioner worked together at Graybar Electric. Mr. Wagner testified that the Petitioner asked him to do something in a demanding way. The two men argued. After some time, Mr. Wagner was leaving to go to lunch, and the Petitioner followed him to the parking lot. The Petitioner allegedly punched Mr. Wagner in the

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Next, the state called a former girlfriend to testify about another altercation in January 1984 involving a former girlfriend. According to the Petitioner's brief, the Petitioner allegedly "pushed her down and then left." The evidence concerning this incident establishes a somewhat more serious assault.[79] Finally, the state called a fellow employee of Consolidated Freightways, who testified that, after failing the company's first driving test, the Petitioner made apparent threats against his fellow employees,

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face with a closed fist, in the chin and in the teeth. In the incident the Petitioner chipped three of Mr. Wagner's teeth and cracked another. (Tr. Vol. V, pp. 58-62). Mr. Wagner then returned to the building to patch himself up. When Mr. Wagner went to the break room, the Petitioner came running toward him and hit Mr. Wagner across the back with a two by four, knocking him to the ground. One of their co-workers stopped the Petitioner from hitting Mr. Wagner a second time with the two by four. (Tr. Vol. V, pp. 63-64). Two other former employees of Graybar Electric also testified about the Petitioner's behavior on the job. Larry J. Price testified that when the Petitioner was fired, he became angry and said that he was going to take some metal to some heads. (Tr. Vol. V, pp. 66-68). Melvin Owens testified that when the Plaintiff was fired from Graybar Electric, he became very upset and cursed and said that he might have to "blow somebody's head off" or something. (Tr. Vol. V, pp. 68-70).

[79] Counsel's description of this incident is understated. In the penalty phase of trial, Jacqueline Childs testified that she and the Petitioner had been "boyfriend and girlfriend" for several months when she broke off their relationship in January 1984. Ms. Childs testified that one night shortly after their break-up, the Petitioner followed her from the hospital where she worked to her sister's house. When she got out of her car, the Petitioner began arguing with her. According to Ms. Childs, the Petitioner snatched her purse from her and threw it, then turned around and threw her. Ms. Childs testified that the Petitioner grabbed her and threw her backwards, causing her to fall to the ground. When Ms. Childs screamed, her sister came out of the house and the Petitioner fled. (Tr. Vol. V, pp. 72-73).

saying: "These people just don't know, messing with me, because they just don't know what I'll do to them."[80]

The Respondent argues that this claim is procedurally barred. The Oklahoma Court of Criminal Appeals found, in his post-conviction appeal, that this issue had been waived by the Petitioner's failure to assert it on direct appeal. *See Ellis v. State of Oklahoma*, 941 P. 2d 527, 529 n. 1 (Okla. Crim. App. 1997). The Petitioner responds that any procedural default can be excused by virtue of ineffective assistance of appellate counsel, citing *Murray v. Carrier*, 477 U. S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); *Coleman v. Thompson*, 501 U. S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *and Banks v. Reynolds*, 54 F. 3d 1508 (10th Cir. 1995).

The Court agrees with the Respondent that this claim is procedurally barred. Consideration of evidence of unadjudicated crimes in imposing the death sentence does not violate a petitioner's due process rights. *Hatch v. Oklahoma*, 58 F. 3d 1447, 1465 (10th Cir. 1995), *cert. denied*, 517 U. S. 1235, 116 S. Ct. 1881, 135 L. Ed. 2d 176 (1996); *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997). Thus, the issue is not one which might be fairly described as a "dead-bang winner," and the Petitioner's appellate counsel was not ineffective for failing to raise it. Moreover, for the same reasons, the claim would fail on the merits.

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[80] "Michael Deloney testified that the Petitioner made the comment in July or August 1984, shortly after he had failed a company driving test. Mr. Deloney testified that he was not sure what the Petitioner meant by the statement, and that he took it as a joke. (Tr. Vol. V, pp. 75-78).

The Petitioner is not entitled to habeas corpus relief on this basis.

Ground Nineteen:

Standard of Proof Applied in Competency Determination.

The Petitioner next claims that he was required to prove his competency to stand trial by the constitutionally infirm clear and convincing evidence standard. *See Cooper v. State of Oklahoma*, 517 U. S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996). A criminal defendant is competent to stand trial if he has both a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U. S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); *Van Woundenberg v. Gibson*, 211 F. 3d 560 (10th Cir. 2000).

The record indicates that after the Petitioner's arrest, the trial court ordered a psychiatric examination. The Petitioner was examined at Eastern State Hospital in Vinita, Oklahoma from March 5, 1986 through April 2, 1986. The trial court conducted a post-examination competency hearing on April 5, 1986. The Petitioner contends that no transcript was made of this hearing, and the record contains none. The only record of the April 5, 1986 competency hearing is a docket sheet entry which reads:

> "Vs. Cyril Wayne Ellis
> ENT: Comes on for Post exam. Comp. Hearing, Deft in person and with counsel, Court order criminal proc. resume matter set for prel. hearing."

At the time of the Petitioner's hearing, Oklahoma law required a criminal defendant to prove his incompetence by clear and convincing evidence. The Supreme Court held this provision to be unconstitutional in *Cooper, supra.*

The Respondent argues that the Petitioner has procedurally defaulted this claim by failing to raise it on appeal or in his state court post-conviction proceedings. The Petitioner replies that at the time of his direct appeal and at the time he filed his post-conviction briefs, raising a constitutional challenge to Oklahoma's standard of proof in competency proceedings would have been futile. The Court agrees that raising the issue would have been futile, and that exhaustion should be excused. *See James v. Gibson*, 211 F. 3d 543, 550 (10th Cir. 2000) (Presentation of a *Cooper*-type claim to the Oklahoma courts prior to the Supreme Court's pronouncement would have been futile, and petitioner's failure to exhaust should be excused); *Walker v. Attorney General, State of Oklahoma*, 167 F. 3d 1339-1343-1344 (10th Cir.) (*Cooper*-type claim was not procedurally barred because "a defendant cannot be expected to comply with a procedural rule that does not exist at the time of the purported default."), *cert. denied*, ___ U. S. ___, 120 S. Ct. 449, 145 L. Ed. 2d 366 (1999); *Rogers v. Gibson*, 173 F. 3d 1278 (10th Cir. 1999), *cert. denied*, ___ U. S. ___, 120 S. Ct. 944, 145 L. Ed. 2d 820 (1999); *West v. Gibson*, 182 F. 3d 934, (text at 1999 WL 339702) (10th Cir. 1999). *Cf.*, *Smallwood v. Gibson*, 191 F. 3d 1257, 1278 (10th Cir. 1999) (*Cooper* claim was procedurally defaulted because petitioner's first post-conviction application was filed after the 1996 *Cooper* decision).

In order to obtain relief on his procedural competency claim, the Petitioner must show that the trial court ignored facts which raised a bona fide doubt regarding the

Petitioner's competency to stand trial. *Rogers v. Gibson*, 173 F. 3d 1278 (10th Cir. 1999), *cert. denied*, ___ U. S. ___, 120 S. Ct. 944, 145 L. Ed. 2d 820 (2000); *Walker*, 167 F. 3d 1339, 1344-1345 (10th Cir.), *cert. denied*, ___ U. S. ___, 120 S. Ct. 449, 145 L. Ed. 2d 366 (1999). Although this standard is normally applied in cases where the trial court failed to hold a competency hearing, it applies with equal force to a case such as this where an unconstitutional burden of proof was (presumably) employed at the competency hearing. *Rogers*, 173 F. 3d at 1290. Relevant to the Court's inquiry is evidence of a defendant's irrational behavior around the time of trial, his demeanor at trial, and any prior medical opinion on competence to stand trial. *Rogers, supra; Drope v. Missouri*, 420 U. S. 162, 180, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). The limited record of the Petitioner's post-examination competency hearing does not reveal what evidence was offered. The Petitioner has not advised the Court what evidence his trial counsel offered at the competency hearing. At the time of the hearing, the records of the Petitioner's competency examination, and the report of the state's chief forensic psychiatrist, were available, and presumably were offered. The psychiatrist's report unequivocally states that the Petitioner was "able to appreciate the nature of the charges against him," and that he was "able to consult with his lawyer and rationally assist in the preparation of his defense."[81] Other than the Petitioner's claim that he heard "voices" directing him to commit the subject crimes, the

[81] See the March 25, 1986 report of the state's chief forensic psychiatrist, R. D. Garcia, M. D. The detailed discharge summary states that the Petitioner was diagnosed with schizophrenia, which was "in complete remission" without any medication.

Petitioner offers no evidence of irrational behavior. Nor does the record reveal any unusual demeanor at trial, or suggest that the Petitioner had any difficulty communicating with counsel or assisting in the preparation of his defense. Although the Petitioner had undergone psychological treatment and testing in the past, there is no prior medical opinion questioning the Petitioner's competence to stand trial.[82] Accordingly, the Court finds no indication in the record that the trial court ignored facts raising a bona fide doubt as to the Petitioner's competence to stand trial. This proposition is without merit. *Cf., Barnett v. Hargett*, 174 F. 3d 1128, 1135 (10th Cir. 1999) (Petitioner established a bona fide doubt as to his competency to stand trial where he had a history of severe mental problems, the proceedings had been delayed to allow him to regain competency on at least two occasions, and his counsel expressed a belief at sentencing that the petitioner was not competent).

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[82] The Petitioner offered some psychological evidence in support of his state post-conviction application which were [sic] not presented at the time of trial. The Petitioner's post-conviction application includes two reports from Philip J. Murphy, Ph. D., who evaluated the Petitioner in October 1990 and in January 1995. Dr. Murphy's evaluations refer to psychological and personality testing conducted in 1986, just before the shootings, in connection with a worker's compensation case in which he claimed a head injury. Although Dr. Murphy's evaluations found that the Petitioner suffered from some form of mental illness, they do not suggest that the Petitioner's mental illness was so acute during the trial proceedings as to render the Petitioner unable to assist in the preparation of his defense. (See Appendix "A" to Petitioner's Application for Post-Conviction Relief). Thus, even if these reports had been available to the trial court in making its competency determination, they would not have been sufficient to raise a bona fide doubt as to the Petitioner's competence to stand trial.

Request for Evidentiary Hearing.

The Petitioner makes a generalized request for an evidentiary hearing "as to the petition as a whole and particularly as to any issues involving facts disputed by the state." (Amended Petition, p. 85). The Petitioner has not revealed what evidence he hopes to offer, or what facts he hopes to prove through an evidentiary hearing. The Petitioner is not entitled to an evidentiary hearing based on his generalized request. *See Boyd v. Ward*, 179 F. 3d 904, 925 (10th Cir. 1999) (Request for evidentiary hearing denied where petitioner failed to indicate what specific facts he hoped to prove through a hearing, and his request for further factfinding was general). *See* Title 28 U. S. C. § 2254(e)(2).[83]

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[83] Title 28 U. S. C. § 2254(e)(2) provides:

"If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(a) the claim relies on –

  (a) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

  (b) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(b) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Motion to Amend to Add Claim of Incompetence To Be Executed

The Petitioner has filed a motion for leave to file a second amended petition, adding a claim that he is incompetent to be executed, citing *Ford v. Wainwright*, 477 U. S. 399, 410, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). The Respondent objects, arguing that the claim should have been pled in the original petition or in the amended petition. The Court, in the exercise of its discretion, finds that leave should be granted, and that the petition should be treated as amended to include the claim of incompetence to be executed, as set forth in the documents appended to the Petitioner's motion.

In *Ford v. Wainwright*, 477 U. S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), the Supreme Court held that the Eighth Amendment prohibits a state from inflicting the death penalty upon a prisoner who is insane at the time of the execution. Since no execution date has yet been set for the Petitioner, his claim is admittedly premature. The Petitioner also concedes that he has not yet exhausted this claim in the state courts. Nevertheless, recent decisions of the appellate courts have held that such claims must be raised in the first petition or be barred.[84]

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[84] In *Stewart v. Martinez-Villareal*, 523 U. S. 637, 118 S. Ct. 1618, 140 L. Ed. 2d 849 (1998), the Court held that a petitioner's claim that he was incompetent to be executed, raised for the second time after his first claim was dismissed by the district court as premature, was not a "second or subsequent" application under the AEDPA. In *Nguyen v. Gibson*, 162 F. 3d 600 (10th Cir. 1998), the Tenth Circuit held that a *Ford* claim, raised for the first time in a second petition, was barred by the AEDPA.

Because the Petitioner's *Ford* claim is both premature and unexhausted, the Court declines to address the merits of the claim at this time. *See Stewart, supra*. The Court, instead, deems it appropriate to dismiss the Petitioner's *Ford* claim as premature.

Motion to Produce Psychological and Housing Records.

The Petitioner moves the Court to order the Oklahoma Department of Corrections to produce copies of all of its mental health and psychological records concerning the Petitioner. Evidence has been offered suggesting that the Petitioner has suffered from some form of mental illness or "psychotic episodes" in recent months. Counsel for the Petitioner represents to the Court that the Petitioner's mental health has recently deteriorated, and that the Petitioner has been under the care of the staff psychiatrist at the Oklahoma State Penitentiary.

Title 76 Okla. Stat. § 19(A)(3) provides that a patient may authorize the release of psychiatric or psychological records to the patient's attorney, a third party payor, or a governmental entity. The record indicates that the Petitioner has signed the appropriate release documents authorizing the records to be released to his counsel. The Respondent warden argues that he has not made the Petitioner's psychiatric records available based on Department of Corrections' Operating Procedure 140108(1)(D)(2)(h), which provides that psychiatric and psychological information will not be released without the written authorization of the facility psychiatrist or psychologist. The Respondent represents to the Court that he

has now obtained oral authorization, and that he will release the records upon receipt of written authorization.

The Respondent's promise to provide the records of the Petitioner's treatment by the Penitentiary's staff psychiatrist "upon receipt of written authorization" is inadequate. It appears from the response that the staff psychiatrist has already given his oral consent to releasing his treatment records to the Petitioner's attorney. The Respondent, as warden of the facility, presumably has the ability to request and obtain all necessary written authorization from the staff psychiatrist. The Respondent offers no explanation why such written authorization, and production of the Petitioner's mental health treatment records, has not been forthcoming. The Respondent will promptly produce the staff psychiatrist's records pertaining to his treatment of the Petitioner, and any other mental health records pertaining to the Petitioner within the possession of the Department of Corrections.

The Petitioner next moves for production of all of the Department of Corrections' records pertaining to his housing assignment. Petitioner's counsel represents to the Court that, unlike all other death row inmates, the Petitioner has never been double-celled. Counsel contends that the Petitioner has been single-celled because of his bizarre behavior, and that information concerning his housing assignment is relevant to the issue of his sanity to be executed.[85] The Respondent responds that no "housing assignment records" exist.

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[85] Petitioner's counsel has provided copies of letters he has received from several death row inmates attesting to the Petitioner's bizarre

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It strains credibility to assert that the Oklahoma State Penitentiary and/or the Department of Corrections maintains no written records documenting inmate housing assignments. Perhaps the problem is one of semantics. By whatever name they are called, the records counsel seeks are likely to be relevant to the Petitioner's claim that he is incompetent to be executed. The Respondent is directed to promptly provide to Petitioner's counsel any records in the possession of the Department of Corrections which document the contention that the Petitioner is single-celled, or which might explain why the Petitioner is single-celled.

Objection to Answer to Certified Question.

The Petitioner has filed an objection urging this Court not to consider the Oklahoma Court of Criminal Appeals' answer to this Court's certified question, arguing that the Court of Criminal Appeals did not afford him an opportunity to brief the issues presented before answering the question and thereby denied him due process. In his objection, the Petitioner does not indicate what arguments he would have presented to the answering court, or what legal authority he would have cited in support of his position. The Petitioner has certainly been afforded an ample opportunity to brief all of the legal issues presented in this case prior to certification of the question, and was likewise given an opportunity to participate in the framing of the question when this Court entered its certification

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behavior in recent months, including screaming, soiling the floor of his cell and lying naked in his own waste. These letters, however, are unsworn and unauthenticated.

order. The Petitioner's argument that he was deprived of due process is without merit.

The Petitioner also argues that the determination of the harmlessness of a Constitutional error is a matter of federal law and not state law. The issue certified by this Court was not whether a constitutional error had occurred or whether such error was harmless. Rather, the question certified was whether reversal of a conviction was required, as a matter of Oklahoma law, based upon an error in an insanity instruction where there is insufficient evidence to support a finding of insanity. The Petitioner's objection is overruled.

Conclusion.

The Petitioner's Motion to Amend is hereby GRANTED, and his Petition is hereby deemed admitted. The Petitioner's claim of incompetence to be executed is hereby DISMISSED as premature. In all other respects, the petition for writ of habeas corpus is hereby DENIED. The Petitioner's request for an evidentiary hearing is likewise DENIED. The Petitioner's objection to the Court considering the state court's answer to the certified question is hereby OVERRULED.

IT IS SO ORDERED this 27th day of November, 2000.

/s/ David L. Russell
DAVID L. RUSSELL
Chief United States District Judge

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CYRIL WAYNE ELLIS,	)	
Appellant,	)	**FOR PUBLICATION**
v.	)	
STATE OF OKLAHOMA,	)	**No. F-86-887**
Appellee.	)	

OPINION

(Filed July 24, 1992)

JOHNSON, Judge:

CYRIL WAYNE ELLIS, appellant, was convicted in the District Court of Oklahoma County, Case No. CRF-86-651, on three counts of Murder in the First Degree and four counts of Shooting With Intent to Kill. Appellant was represented by counsel. The jury returned a verdict of guilty on each count and set punishment at death for each count of murder, together with sentences of 2,000 years, 3,000 years, 1,000 years and 1,000 years for the counts of Shooting With Intent to Kill. Appellant appeals to this Court.

The scenario and trail of horror in this case started on January 26, 1986, when the appellant got into an argument with his fiancee, Cheryl James. For the first time in their relationship of over a year he struck her and then later that day when in remorse and in the girlfriend's presence took pills in an apparent suicide attempt. Cheryl then drove him to Presbyterian Hospital where he was hospitalized for a few days and then transferred to the psychiatric ward of St. Anthony's Hospital. On January 29th Cheryl went to visit him and after a couple of hours

left. When she got to her car, the appellant came running out behind her and forced her to take him with her. She became afraid and tried to get away from him and managed to get help from a security guard at the Sheraton Center in downtown Oklahoma City. She told the security guard that appellant was acting crazy and he had just gotten out of a mental ward. An altercation occurred and police arrived but they failed to arrest the appellant. Later on January 29, appellant attempted to purchase a hand gun, by falsely telling the store clerks that he operated a restaurant and needed a gun for protection. Appellant did not have enough money to purchase the gun, but a store clerk agreed to loan appellant a gun that he owned. Appellant purchased some bullets for the gun and left the store.

The next morning, appellant was riding around and observed his fiancee, Cheryl James, riding in a car with her sister's boyfriend, Robert Dumas. Appellant pulled along the car and had a conversation with Ms. James through the windows. When Dumas tried to drive away, appellant chased him and fired at his car. Dumas drove into a yard seeking help and appellant blocked him in. Ms. James jumped out and ran for help. Appellant pointed his gun at Dumas and forced him to get into the trunk of the car. When Dumas beat on the trunk hood for help, appellant opened it and said, "I see you don't want to live." Appellant fired two shots into Dumas' body and shut the trunk. Dumas survived his injuries.

Appellant next went to Dumas' home, where Ms. James had spent the night with her mother and her sister, Teresa Thomas. Only Ms. Thomas and her six-year-old daughter, Tameca, were at home. Using the butt of a gun, appellant knocked a front window out and shot Ms. Thomas

inside the house. When she ran to the back yard, appellant followed and shot her several more times, fatally wounding her. Tameca was found on the back steps of the house. She had been shot three times. Although critically injured, Tameca recovered and testified at trial.

Appellant then returned to his house to retrieve more ammunition before proceeding to his place of employment. Appellant encountered Gordon Moore in the parking lot and ordered him to kneel down on the ground between two cars. Appellant shot him in the face. Mr. Moore, who also recovered, played dead until appellant left. Appellant next went into an office, where he shot Carl Lake. Witness testified hearing Mr. Lake telling appellant to leave, and then hearing a second shot. Mr. Lake was fatally wounded. Appellant then fired at James Rider from the top of a loading dock. After Mr. Rider staggered and fell to the ground, appellant shot him again. Mr. Rider was fatally wounded. As appellant was driving away, a number of men ran out of the place into the parking lot. Appellant stopped, opened fire, reloaded, fired again, and drove away. Ancil Davis was hit but survived.

At trial, appellant did not deny these acts, but raised the defense of insanity.

ISSUES RELATED TO JURY SELECTION

Appellant claims that he was deprived of his right to trial by a jury composed of a fair cross-section of the community because his jury panel was summoned from a list of registered voters. He claims that this scheme systematically resulted in under-representation of racial minorities.

The record reveals that thirty-five people were examined as potential jurors or alternate jurors at appellant's trial. All but four of these identified themselves by race. Of the thirty-one whose races are known, twenty-one may be described as being of European descent, four of Black, four of Native American, one of Asian, and one of Hispanic. Census data was offered to show that in 1980 the population of Oklahoma County contained 82.49 percent Caucasians, 12.35 percent Blacks, 2.51 percent Native Americans, .99 percent Asians, and 1.66 percent others. The known composition of persons examined at trial was 67.74 percent Caucasian, 12.90 percent Black, 12.90 percent Native American, 3.23 percent Asian, and 3.23 percent others. Assuming that the 1980 census data on which appellant relies was still reasonably accurate at the time of his trial, the only group under-represented in this case was Caucasian. The record does not support appellant's assertion that minorities were under-represented due to systematic exclusion. *Cf. Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). Even if we were to accept appellant's contention that one of the Blacks should be considered a Native American, we are compelled to find that any under-representation of Blacks was so slight that there was no violation of the fair-cross-section requirement. *See also Fox v. State*, 779 P.2d 562, 566 (Okl.Cr.1989).

Appellant next challenges the composition of the jury on the ground that 38 O.S.1981, § 28(A) permits persons over seventy years of age to excuse themselves from service without showing hardship or other legal excuse. Appellant has provided this Court with no more information to show that these people constitute a distinctive group than was provided in the case of *Moore v. State*, 736

P.2d 161, 165 (Okl.Cr.1987), *cert. denied*, 484 U.S. 873, 108 S.Ct. 212, 98 L.Ed.2d 163 (1987), and we once again reject this argument. *See Fox*, 779 P.2d at 566.

Appellant also asserts that the trial court erred in not allowing individual voir dire of each juror, out of the hearing of the others, as to their views on capital punishment. As we noted in *Foster v. State*, 714 P.2d 1031, 1037 (Okl.Cr.1986), *cert. denied*, 479 U.S. 873, 107 S.Ct. 249, 93 L.Ed.2d 173 (1986), the manner of conducting voir dire is left to the sound discretion of the trial judge. In this case, the trial judge did allow individual voir dire outside the hearing of other potential jurors when it appeared necessary. Finding no abuse of discretion in the record, the assignment is without merit.

Citing *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), appellant claims that reversal is required because the prosecutor exercised his peremptory challenges to remove minorities in an unconstitutionally discriminatory manner. Of the ten non-caucasian people examined to serve as jurors or alternates, the Hispanic served on the jury and one Native American served as an alternate. Two African Americans were excused for cause because one had formed an opinion concerning the case and the other could not sit impartially because of her personal acquaintance with appellant. The Asian and one Native American were removed with appellant's seventh and eighth peremptory challenges. Appellant waived his ninth challenge.

The State used four peremptory challenges to remove two African Americans and two Native Americans. One African American was removed because he appeared inattentive at some times and disruptive at others. The

trial judge confirmed the observation, and appellant did not challenge it at trial. The other African American made conflicting statements concerning her ability to keep her mind on the trial if it stretched into the following week because loss of business would leave her unable to pay her bills. Appellant successfully argued that the State's challenge for cause should not be granted, but raised no objection to the State's use of a peremptory challenge to excuse her. The State provided no reason for excusing the Native Americans, nor did appellant raise any objection to the State's use of peremptory challenges to excuse them.

On appeal, appellant asserts that a prima facie case of purposeful discrimination is made under *Batson* by showing that the defendant is a member of a cognizable group and that the prosecutor has exercised peremptory challenges to remove members of that group from the *venire*. However, this is but a partial statement of the law revealed by the Supreme Court. Where a defendant objects to the prosecutor's use of peremptory challenges in the selection of a petit jury, the defendant must also show that the use of peremptories and any other relevant circumstances "raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. *See also Modden v. Texas*, 485 U.S. 1040, 108 S.Ct. 1603, 99 L.Ed.2d 917 (1988) (Marshall, J., dissenting). Although the trial court, in an abundance of caution, required the State to announce a neutral reason for the exclusion of any venireman of appellant's race, appellant never objected to the State's use of peremptory challenges and no attempt was made at trial to establish a prima facie case of purposeful discrimination. (Compare *Batson*, where petitioner made a timely objection to the

prosecutor's removal of all black persons on the venire). *See also Modden v. Texas*, *supra*, *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986); *United States v. Brown*, 817 F.2d 674 (10th Cir. 1987); *Garrett v. Morris*, 815 F.2d 509 (8th Cir. 1987); and *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987).

In the present case, the trial court was never asked to make a determination whether the State's peremptories were being used in an unconstitutional manner. That is the place where the determination must be made. "The **trial court** then will have the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 96, 106 S.Ct. at 1722. (Emphasis added) "If the **trial court** decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed." *Id.* at 97, 106 S.Ct. at 1723. (Emphasis added) "Since the **trial judge's** findings in the context under consideration here largely turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Id.* at 96, n. 21, 106 S.Ct. at 1722, n. 21. (Emphasis added) By failing to object or seek a determination by the trial court, appellant has waived this issue for appellate review. *Cf. Manuel v. State*, 751 P.2d 764 (Okl.Cr. 1988); *Scott v. State*, 751 P.2d 758 (Okl.Cr. 1988); and *Johnson v. State*, 731 P.2d 993 (Okl.Cr. 1987).

Nevertheless, the trial court, by requiring the State to provide a neutral basis for excusing persons of appellant's race, provided this Court with an adequate record for determination of the issue on the merits. Appellant claims that the neutral reason given by the State to excuse the

second African American was nothing more than a pretext to cloak racial discrimination. He bases this assertion on the fact that a white male dentist who expressed concern for his business was not excused by the State. Appellant compares this case to *Garrett v. Morris*, 815 F.2d 509 (8th Cir. 1987), in which the government removed black jurors due to their lack of background, education, and knowledge to understand the evidence, when white jurors remained on the panel even though less qualified under those criteria. No such evidence of pretext exists in this case. At no time did the white juror state that he would be unable to devote his full attention to the evidence presented at trial, nor did he state that he would be unable to pay his bills if required to serve. The reasons relied upon by the State were shown only in the case of the black juror.[1] Appellant's rights under the Fourteenth Amendment as construed in *Batson* were not violated. Appellant cannot fail to complain or object at trial and now try to profit from his own acts. The record does not reveal the challenges were used to hide racial discrimination; the place for such determination is in the trial court, not on appeal.

ISSUES RELATING TO FIRST STAGE EVIDENCE

Prior to trial appellant was examined to determine whether he was competent to stand trial. At trial, appellant

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[1] The prosecutor also stated that the black juror was worried about feeding her family, when in fact she was divorced and living alone. Although this could cast doubt upon the prosecutor's motives, we note that for some reason, defense counsel shared this erroneous impression. (Tr. Vol. II, p. 130) In light of the valid reasons expressed and the absence of objection, we find that the State was properly permitted to excuse her.

offered the records of his competency evaluation conducted at Eastern State Hospital to support his defense of insanity. The State objected on the ground that competency and insanity are distinct issues and the records from Eastern State Hospital would be irrelevant to the issue of insanity. The trial court sustained the objection. Appellant seeks reversal claiming that the trial court's ruling prevented him from presenting evidence material to his only defense.

It is well settled that the question of an accused's present competency to stand trial is an entirely different matter than the defense of insanity. *See Miller v. State*, 751 P.2d 733 (Okl.Cr.1988). Nothing in the Eastern State Hospital records was directed to the question of sanity, which is whether appellant was capable of knowing the wrongfulness of his acts when he committed them. *See* 21 O.S.1981 § 152(4). Rather, the examination was directed solely to the question of competency, i.e., whether appellant had the ability at the time of trial to understand the nature of the charges and proceedings brought against him, and was able to effectively and rationally assist in his defense. *See* 22 O.S.1981, § 1175.1. Appellant sought to introduce the records merely because they were authentic. Any probative value was substantially outweighed by the danger of misleading the jury and confusing the issues of competency and sanity, 12 O.S.1981, § 2403, and we find that the trial court ruled properly.

ISSUES RELATING TO FIRST STAGE CLOSING ARGUMENT

Appellant claims that while discussing the evidence concerning the shooting of six-year-old Tameca Thomas, the prosecutor picked up the gun appellant had used, "slowly paraded in front of the jury, pretending to be Cyril

Ellis," pointed the gun at the ground, and "dry-fired" it. Much of appellant's description of the prosecutor's actions can be viewed only as embellishment of the record. As to "dry-firing" the gun while pointing it down, a fact to which the State has stipulated, this is partially what appellant described in his taped statement to the police, which was played for the jury. The prosecutor did embellish the facts and was overly graphic but was within the bounds of closing argument. We find that the prosecutor's actions fell within the wide latitude permitted during closing argument. *See Cervantes v. State*, 556 P.2d 622, 627 (Okl.Cr.1976). Appellant's analogy to the conduct of the prosecutor in *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982), is tenuous at best, and in any event, is unpersuasive in this case.

Appellant additionally claims that he was prejudiced by an emotional outburst from Tameca's relatives in the courtroom. The record shows that the trial court sent the jury out of the courtroom immediately, and the sobbing women were escorted out of the room by members of their family. The incident was of short duration and the trial court took appropriate measures to prevent any unfair prejudice. In his brief, appellant seems to argue that the trial court should have admonished the jury. However, we note that no admonishment was requested at trial. Appellant's failure to object is his fault; this cannot be said to be fundamental error. Appellant has provided no authority requiring such action by the trial court *sua sponte*. It is appellant's burden to support his arguments with specific, relevant authority. *VanWoundenberg v. State*, 720 P.2d 328, 335 (Okl.Cr. 1986), *cert. denied*, 479 U.S. 956, 107 S.Ct. 447, 93 L.Ed.2d 395 (1986).

Finally, while not condoning all of the prosecutor's statements, we can find no error warranting reversal or modification.

ISSUES CONCERNING FIRST STAGE JURY INSTRUCTIONS

The trial court refused appellant's Requested Jury Instruction No. 12, which read in part:

> You are further instructed that under the facts of this case, the crime of murder as heretofore defined in these instruction [sic], embraces the lesser degree of felonious homicide known as first degree manslaughter. In such cases, the statutes of this State define homicide as manslaughter in the first degree where the State has proved beyond a reasonable doubt the following: (1) the death of a human being; (2) without a planned and deliberate design to effect death; and (3) by means of a dangerous weapon.

The Instruction also provided for manslaughter committed while in the heat of passion.

Appellant relies upon *Smith v. State*, 652 P.2d 303 (Okl.Cr.1982), to show that the foregoing Instruction contains an accurate statement of the elements of manslaughter. However, we do not find that the evidence produced at trial supported this requested Instruction. Where there is no evidence to support a lesser included offense to the crime, it is not only unnecessary to instruct on it, but the trial court has no right to ask the jury to consider the issue. *Bennett v. State*, 743 P.2d 1096, 1098 (Okl.Cr.1987). Each of the homicide victims in this case were shot multiple times with at least one wound to the head. Appellant had to reload his weapon, a revolver,

before each killing. He prefaced the murder of Carl Lake with the statement, "I'm going to blow your f* * * ing head off." Regardless of whether appellant was capable of knowing the wrongfulness of his acts, we find that the evidence points only to a deliberate design to effect death. Appellant's requested Instruction was, therefore, properly refused.

Appellant further asserts that the insanity Instruction given in this case placed an impermissible burden of proof upon him. However, the Instruction given was similar to the one considered and approved by this Court in *Morris v. State*, 766 P.2d 1388, 1390 (Okl.Cr.1988). This assignment of error is without merit.

Appellant finally asserts that the trial court erred by refusing to instruct the jury concerning the consequences of returning a verdict of not guilty by reason of insanity. We continue to adhere to our position that 22 O.S.Supp.1988, § 1161, "is merely a procedural statement of disposition subsequent to the verdict and is immaterial to the process of rendering a verdict concerning the sanity of the accused." *Thomsen v. State*, 582 P.2d 829, 832 (Okl.Cr.1978). *See also Boutwell v. State*, 659 P.2d 322 (Okl.Cr.1983).

Therefore, finding no error which warrants reversal, the finding of guilt as to Murder in the First Degree and four counts of Shooting with Intent to Kill is AFFIRMED.

ISSUES RELATING TO SECOND STAGE EVIDENCE

Appellant complains that the trial court erred by permitting the State to present the testimony of Michael Deloney. The record shows that on the evening prior to the

commencement of trial, defense counsel was called by the prosecutor and informed that Mr. Deloney would testify during the second stage and provided him with the substance of the expected testimony. Prior to trial, appellant sought a continuance, but this was not based upon Mr. Deloney's testimony, and Mr. Deloney's name was never mentioned. Appellant did not bring this problem to the trial court's attention until eight days after trial had commenced. On appeal, appellant claims that the State's failure to give notice two days prior to trial violated his rights under the Okla. Const. art. 2, § 20, and 21 O.S.1981, § 701.10. These grounds were not relied upon at trial. Nonetheless, the trial judge permitted defense counsel to interview Mr. Deloney in chambers prior to his testimony, and the record reflects that defense counsel cross-examined the witness effectively.

We agree with the argument of the Attorney General that art. 2, § 20, does not apply to evidence to be used in support of the State's Bill of Particulars. The relevant portion of this constitutional provision reads, "[I]n capital cases, [the defendant] shall be furnished with a list of the witnesses that will be called in chief, to prove the allegations of the Indictment or **Information** . . ." (Emphasis added) We have previously recognized the distinction between a criminal Information and a Bill of Particulars in capital proceedings. For example, although a defendant is entitled to a preliminary hearing upon an amended Information, there is no such right with regard to a Bill of Particulars. *Newsted v. State*, 720 P.2d 734 (Okl.Cr.1986), *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986). Under a plain reading of the language, the constitutional two-day requirement applies only to witnesses called to prove the allegations of the Indictment or Information,

not the Bill of Particulars. This is similar to the same rule as it would relate to rebuttal witnesses and notice.

The Legislature, by enacting the notice requirement contained in 21 O.S.1981, § 701.10, appears to have recognized this same distinction. Indeed, if the constitutional provision had application here, no purpose would be served by the sentence, "Only such evidence in aggravation as the State has made known to the defendant prior to trial shall be admissible." The Legislature is never presumed to have done a vain thing. *Farris v. Cannon*, 649 P.2d 529 (Okl.Cr.1982). In order to give effect to the language of the statute, we must conclude that evidence in aggravation is to be treated separately from witnesses to prove the allegations of the Information.

The State did make the evidence in aggravation known to the defense prior to trial, and defense counsel was given an adequate opportunity to prepare for this evidence. Counsel could have made a timely objection on the day of trial, which he did not do, and cannot stay behind that well-known log and object eight (8) days later or on appeal. Accordingly, this assignment of error is without merit.

Appellant also complains of several photographs which were admitted during the second stage of trial depicting the victims at the crime scenes. Each of the pictures was excluded or withdrawn during the first stage of trial upon defense counsel's objection. In the second stage, however, the trial judge found that the pictures were very probative to show that the murders were especially heinous, atrocious, or cruel.

We find no abuse of discretion. In order to prove the aggravating circumstance of heinous, atrocious, or cruel,

the State must prove that death was preceded by torture or serious physical abuse. *Stouffer v. State*, 742 P.2d 562, 563 (Okl.Cr.1987). Proof of serious physical abuse in this case was provided largely by forensic and blood spatter analysis. Although the pictures contained a great deal of blood, they were necessary to form a basis for the blood spatter analysis. The appellant caused the problem; the pictures were only graphics of the facts and the jury must see them and have the facts before them so as to make proper findings. We cannot say that the probative value of the photos was outweighed by the danger of unfair prejudice, 12 O.S.1981, § 2403, and this assignment of error is without merit.

The trial court refused to permit appellant to present evidence concerning parole practices. In light of our previous holdings, we find no error. *See Walker v. State*, 723 P.2d 273, 280 (Okl.Cr.1986).

Appellant also seeks reversal because the jury was exposed to the possibility of parole. The jury began second stage deliberations on November 4, 1986. An election held that day contained State Question 593, which asked the people of the State whether the Oklahoma Constitution should be amended to take away the power of the Pardon and Parole Board and the Governor to grant paroles to convicts sentenced to death or to life in the prison without parole. Defense counsel repeatedly approached the trial judge while the jury was deliberating, asking that some provision be made for the juror's right to vote. When the judge prepared an order to have the jury vote at the County election Board offices without breaking sequestration, defense counsel raised the problem of Question 593 being on the ballot. He moved for a mistrial, and in the alternative asked the trial court to instruct the jury that

"life imprisonment means life." The trial court questioned defense counsel's ethics and overruled both motions.

We would first note that the jury was instructed "not [to] consider any matter of fact or law except such as have been given you in open court." The jurors were bound by oath not to consider extraneous information and there is no indication in the record that they failed to live up to their oath. Furthermore, if it was improper for the jury to vote while sequestered, any error was invited by the defense and cannot serve as a basis for reversal. *See Foster v. State*, 742 P.2d 1131, 1134 (Okl.Cr.1987). The defendant cannot invite error and then seek to profit from it.

ISSUES RELATING TO SECOND STAGE JURY INSTRUCTIONS

In the first stage of trial, the jury was instructed:

> You should not let sympathy, sentiment, or prejudice enter into your deliberations, but should discharge your duties as jurors impartially, conscientiously, and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.

After all of the second stage evidence had been submitted, the jury was further instructed that the first stage instructions still applied where appropriate and were to be considered together with the second stage instructions. Appellant claims that these instructions, when read together, unconstitutionally precluded the jury from considering sympathy as a mitigating factor.

This Court approved this instruction in *Fox v. State*, 779 P.2d at 562, 574 (Okl.Cr.1989); further, the U.S.

Supreme Court also has approved this instruction and found that its use was not error. *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

The trial court refused appellant's requested Instruction which would have required the State to disprove beyond a reasonable doubt the existence of every mitigating circumstance. However, appellant offers no authority which would require the trial court to give such an Instruction. *See VanWoundenberg v. State*, 720 P.2d at 335. Furthermore, we would point out that once the State has carried its statutory burden of proving beyond a reasonable doubt the existence of at least one aggravating circumstance, the sentencing determination properly lies in the hands of the jury. This is a balancing process, and the State has no burden to disprove any mitigating circumstances. Unless the jury finds that the aggravating circumstance(s) are outweighed by the mitigating circumstance(s), it is entitled under the statute to consider the death penalty. The trial court did not err by refusing to give the Instruction.

Appellant seeks reversal because the trial court refused to give his requested instruction that life may be imposed even if the aggravating circumstances were found to outweigh the mitigating circumstances. Appellant concedes that this Court has previously considered and rejected this argument. *See Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980). *See also Fox v. State*, 779 P.2d 562, 573 (Okl.Cr.1989). We are not persuaded to change our position.

On five occasions during the jury's deliberations, defense counsel requested that the trial judge give the final portion of OUJI-CR-442, informing the jury that if a

unanimous verdict could not be reached, the jury would be discharged and a sentence of life imprisonment would be imposed. On the last three of these occasions, defense counsel also asked that the judge take the case from the jury. 21 O.S.Supp.1988, § 701.11. Each request was refused. On appeal, appellant seeks reversal of his death sentences because the jury was permitted to deliberate for over seventeen hours, and because the requested Instruction was never given.

We find that the length of the jury's deliberations was not unreasonable under the circumstances of this case. The jury was determining sentences on three counts of murder, and had to determine the existence of three aggravating circumstances in each count. Additionally, the jury was setting terms of incarceration on four counts of shooting with intent to kill. The jury was considering evidence presented in a trial that took more than a week, and included records from Eastern State Hospital which had been admitted during the second stage without any professional explanation. These records alone consisted of more than ninety pages, many of which were printed on both sides. Some of the material was type-written and single spaced, and some was handwritten and barely legible. The trial court noted that the jury had requested all of the exhibits admitted during trial, including first stage exhibits, and never expressed difficulty during deliberations. As the time for deliberations was not unreasonable, the trial court did not abuse its discretion by refusing to give the requested Instruction or take the case from the jury.

Appellant also asks this Court to resolve what he perceives as an inconsistency between *Johnson v. State*, 731 P.2d 993 (Okl.Cr.1987), and *Hayes v. State*, 738 P.2d

533 (Okl.Cr.1987). He claims that *Johnson* precludes giving the final portion of OUJI-CR-442, while *Hayes* prohibits its use only until it is apparent the jury has exceeded a reasonable time for reaching a decision on punishment. Appellant has misread the language in *Johnson*. That opinion properly states that the language in 21 O.S.Supp.1988, § 701.11, is an instruction to the trial court. Also, the *Johnson* case involved a request for the instruction before any deliberations had taken place. We continue to adhere to the view that giving an Instruction such as the one requested in *Johnson* "would amount to an invitation to avoid the difficult duty of passing sentence upon the life of the accused." *Johnson*, 731 P.2d at 1005.

Whether the final portion of OUJI-CR-442 will be given remains a question directed to the sound discretion of the trial judge, who is in the best position to determine whether the additional instruction would be helpful to a final resolution of the case. Neither *Johnson* nor *Hayes* is in conflict with this view.

Appellant requested an instruction informing the jury that the State must prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. Appellant notes that we have rejected this argument before. *See Johnson v. State*, *supra*, and *Fox v. State*, 779 P.2d at 573. The United States Supreme Court also recognizes that no such Instruction is constitutionally required. *Zant v. Stephens*, 462 U.S. 862, 890, 103 S.Ct. 2733, 2749, 77 L.Ed.2d 235 (1983).

Appellant next challenges the use of the other continuing threat circumstance, 21 O.S.1981, § 701.12(7), in his case. Appellant is not challenging the validity of the statute, for in his brief, he recognizes that "on its face

'continuing threat' appears not to be vague." Rather, he claims that this Court is applying the circumstance in an overbroad, arbitrary, and capricious manner, and claims that his death sentence must be set aside because the trial court failed to narrow its application with additional instructions. We have squarely addressed and rejected these arguments. *VanWoundenberg v. State*, 720 P.2d at 336-37. The evidence was clear that, without question, the defendant was a "continuing threat".

Appellant finally attacks the adequacy of the trial court's instructions on the aggravating circumstance of "especially heinous, atrocious, or cruel." 21 O.S.1981, § 701.12(4). As noted above, this circumstance may be applied only to those murders in which torture or serious physical abuse preceded death. *Stouffer v. State*, *supra*. The trial court in the present case failed to give an instruction which would so limit this circumstance. Accordingly, the jury's finding of this circumstance must fail.

DEATH SENTENCE REVIEW

Pursuant to 21 O.S.Supp.1988, § 701.13(C), we are required to determine:

> 1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> 2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 701.12 of this title.

As noted above, we have stricken the aggravating circumstance of heinous, atrocious or cruel due to insufficient

instruction. However, the jury imposed sentences of death after finding two other aggravating circumstances in each murder. The other aggravating circumstances found were: (1) appellant knowingly created a great risk of death to more than one person, 21 O.S.1981, § 701.12(2); and (2) the existence of a probability that appellant would commit criminal acts of violence that would constitute a continuing threat to society, § 701.12(7).

The murders in this case took place at two crime scenes. At the first, appellant shot and killed Teresa Thomas. Then he turned his gun on Tameca Thomas, critically injuring her. At the second scene, appellant killed two men and shot two more intending to kill them. The evidence clearly supports the jury's finding that appellant knowingly created a great risk of death to more than one person in all three cases.

Blood spatter analysis showed that Teresa Thomas was originally shot inside her house. The trail of blood led to the back door and into the back yard. Her dirty, blood stained pants showed that she had crawled along the back of the house attempting to escape appellant. In his taped statement, appellant described Ms. Thomas's pleading for her life. Bullet holes in the house showed that appellant continued to fire at her as she crawled.

Witnesses heard Carl Lake shout at appellant after he had been shot once. Appellant's statement revealed that he shot Mr. Lake once, and as Mr. Lake moved toward him, he fired a second time. Forensic and blood spatter analysis confirmed this testimony. When appellant entered Mr. Lake's office, Lake put up his hand in a defensive motion. Appellant fired a shot that grazed Lake's fingertip and passed across his face causing an entry wound in one

cheek and an exit wound in the other. Mr. Lake went across the room, grabbed a box, slipped, and fell down in front of appellant. Appellant fired a second shot into the top of Lake's head, killing him instantly.

Jim Rider suffered four gunshot wounds. Two struck him in the front. One grazed his head and the other passed through abdominal tissue. Neither was fatal. A witness testified that Rider started up the stairs at that point, stumbled, and fell down. When Ellis walked past, he fired two more shots into Rider's back. One of these was fatal.

The State also presented evidence that appellant showed no remorse for the killings, that he had acted calmly and coolly in the commission of each crime, and that appellant said he had not killed all of the people he had meant to. After committing the murders, he called his place of employment and asked them, "How did you like that trick or treat I just gave you?" He also told his sister that he had been there taking care of "business." Other testimony showed that appellant had threatened to "take some metal to some heads," and had struck fellow employees with fists and boards without any apparent provocation. He had physically assaulted his fiancee and a former girlfriend when problems in the relationships arose. We find that all of this evidence supports the jury's finding of a probability that appellant would commit criminal acts of violence that would constitute a continuing threat to society. *See VanWoundenberg v. State*, 720 P.2d 328 (Okl.Cr.1986), *cert. denied*, 479 U.S. 956, 107 S.Ct. 447, 93 L.Ed.2d 395 (1986).

We also can find no indication in the record that the jury imposed the sentences of death under the influence of passion, prejudice, or any other arbitrary factor.

Appellant seeks modification of his death sentences because they are excessive in light of his mental illness. The jury was presented evidence of whatever mental illness appellant may suffer and was instructed that a history of mental illness or impairment at the time of the crime due to mental illness could be considered as mitigating circumstances. The existence and weight of these circumstances was properly left in the hands of the jury.

Finally, appellant claims that this Court violates his constitutional right to due process by re-weighing the aggravating and mitigating circumstances in his case after one aggravating circumstance has been found invalid. However, in *Stouffer v. State*, 742 P.2d 562, 564 (Okl.Cr.1987), this Court held that an independent re-weighing of aggravating and mitigating circumstances is implicit to our statutory duty to determine the factual substantial of the verdict and the validity of the death sentence. *See also Castro v. State*, 749 P.2d 1146 (Okl.Cr.1988) (Opinion on Rehearing); and *Sellers v. State*, 809 P.2d 676, 691 (Okl.Cr.1991). After discarding the evidence supporting the invalid aggravating circumstance of "especially heinous, atrocious or cruel," and after carefully weighing the remaining aggravating circumstances against the mitigating evidence presented at trial, we find the sentences of death to be factually substantiated and appropriate, and they are hereby **AFFIRMED**.

On November 7, 1990, appellate counsel filed in this Court a Motion for New Trial Based on Newly Discovered Evidence. Appellate counsel avers that shortly before oral

argument of this case, held on March 27, 1990, the appellant notified her that he had undergone a psychological examination on January 7, 1986, nineteen days before the appellant committed the crimes. The test, a Minnesota Multi-Phasic Personality Inventory (MMPI), was taken in conjunction with a 1984 workers' compensation claim for an injury to appellant's foot. Appellate counsel claims that a psychologist who has reviewed the test has informed her that the results show appellant was paranoid schizophrenic. Appellate counsel surmises that appellant was apparently incompetent to remember having taken the test, but argues that as his defense at trial was insanity, a psychological examination performed so closely in time to the commission of the crimes is of utmost relevance and demands a new trial, or in the alternative, an evidentiary hearing.

The test for whether a motion for a new trial should be granted based upon newly discovered evidence is: (1) whether the evidence is material; (2) whether the evidence could not have been discovered before trial with reasonable diligence; (3) whether the evidence is cumulative; and (4) whether the evidence creates a reasonable probability that, had it been introduced at trial, it would have changed the outcome. *Sheppard v. State*, 731 P.2d 989, 990 (Okl.Cr.1987). For the following reasons, we do not find that appellant has satisfied this test.

Initially, the record reveals that defense counsel was aware of appellant's prior foot injury at trial. (Vol. III, p. 133). We are of the opinion that the MMPI test could have been discovered by trial counsel prior to trial in the exercise of due diligence. We find support in the fact that trial counsel diligently pursued another worker's compensation claim of appellant concerning a head injury he suffered

while at work. Throughout the trial, both during cross-examination of the State's witnesses and direct examination of his own witnesses, defense counsel stressed the fact that appellant had suffered a head injury.

We are further convinced, beyond a reasonable doubt, that even had this evidence been introduced at trial, the outcome of the trial would not have changed. Defense counsel presented various witnesses who testified that prior to the crimes, appellant had suffered various mental problems, had uttered strange things, had heard voices talking to him, had demonstrated peculiar and erratic behavior, had attempted suicide and had checked himself into the psychiatric wing of St. Anthony's Hospital. It is evident that the jury heard considerable evidence concerning appellant's mental problems.

We find that appellant's motion for a new trial or in the alternative, an evidentiary hearing, should be and hereby is, **DENIED**.

AN APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY, OKLAHOMA
THE HONORABLE RAYMOND NAIFEH,
DISTRICT JUDGE

CYRIL WAYNE ELLIS, Appellant, was convicted in the District Court of Oklahoma County, Case No. CRF-86-651, on three counts of Murder in the First Degree and four counts of Shooting With Intent to Kill. The jury returned a verdict of guilty on each count and set punishment at death for each count of murder, together with sentences of 2,000 years, 3,000 years, 1,000 years and 1,000 years for the counts of Shooting with Intent to Kill, and he appeals. The Judgments and Sentences are **AFFIRMED** and

appellant's motion for a new trial or in the alternative, an evidentiary hearing, is hereby **DENIED**.

LEE ANN JONES PETERS
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OKLAHOMA COUNTY PUBLIC DEFENDER
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OPINION BY: JOHNSON, J.
LANE, P.J.: CONCUR
LUMPKIN, V.P.J.: SPECIALLY CONCURS
BRETT, J.: SPECIALLY CONCURS
PARKS, J.: SPECIALLY CONCURS

LUMPKIN, VICE-PRESIDING JUDGE: SPECIALLY CONCURS

I concur in the Court's decision to affirm each of the judgments and sentences in this case. However, the Court summarily disregards the scope of its authority on appellate review in determining that the especially heinous, atrocious or cruel aggravating circumstance must fail. While the instruction limiting the application of this

aggravator to murders involving torture or serious physical abuse was not given, neither the federal or state constitutions nor the statutory grant of authority to this Court for appellate review preclude the review of the evidence to determine if the aggravating circumstance is supported by the record.

This Court is not precluded from considering whether the evidence presented at trial supports this circumstance under a narrowed construction. Although the Supreme Court found that the circumstance was not adequately narrowed in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), aff'g *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987); nothing indicates that an appellate court cannot narrow the circumstance on review. Rather, the Supreme Court has indicated just the opposite. *See Maynard v. Cartwright*, 486 U.S. at 363, 108 S.Ct. at 1859, 100 L.Ed.2d at 374. The Tenth Circuit considered adopting a permissible construction to apply for the purposes of federal habeas corpus review. *Cartwright v. Maynard*, 822 F.2d at 1491. It declined to do so because "[t]hat determination must be made by the state in the first instance as it construes its own laws in light of constitutional requirements." *Id.* at 1492.

This view is also supported by *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). There, the Supreme Court found that the Florida Supreme Court's narrowing construction of this circumstance provided adequate guidance "to those charged with the duty of recommending or imposing sentence in capital cases." 428 U.S. at 256, 96 S.Ct. 2960. In footnote 12 of that opinion, the Court went further to indicate that if the facts of the crime could accurately be characterized as falling within the permissible construction, then the finding of the

circumstance may be upheld even though the narrowing language was not specifically used. *Id.* at 255, n. 12. As the uncontroverted evidence shows, it is clear that appellant's acts may be characterized accurately as especially heinous, atrocious, or cruel under the narrowing construction adopted in *Stouffer v. State*, 742 P.2d 562 (Okl.Cr.1987). In substance, there is no distinction between reweighing evidence regarding remaining aggravators after striking an invalid aggravating circumstance and reweighing the evidence pursuant to the narrowed construction. I would therefore affirm the heinous, atrocious, or cruel aggravating circumstance because torture or serious physical abuse was clearly proven by the evidence.

BRETT, J., SPECIALLY CONCURRING:

I concur with the majority opinion. However, I wish to address the issue of whether the prosecutor exercised his peremptory challenges to remove minorities in an unconstitutionally discriminatory manner. The United States Supreme Court has recently revisited this issue in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Now, "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race." *Powers*, 499 U.S. at ___, 111 S.Ct. at 1366, 113 L.Ed.2d at 419. "Although a defendant has no right to a 'petit jury composed in whole or in part of persons of [the defendant's] own race,' [citation omitted] he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria." *Id.*, 499 U.S. at ___, 111 S.Ct. at 1367, 113 L.Ed.2d at 421.

Although a defendant need not demonstrate membership in a cognizable racial group, the two-prong test of *Batson* is still applicable. In order to establish a prima facie case of discrimination under *Batson*, a defendant must 1) demonstrate that the State exercised a peremptory challenge to remove a venireperson from a cognizable racial group, and 2) demonstrate that the State removed that venireperson solely on the basis of their race.

PARKS, J., SPECIALLY CONCURRING:

I concur with the majority that the jury's finding of the "especially heinous, atrocious or cruel" aggravating circumstance is invalid due to incomplete instructions.[1] I also agree with the analysis concerning the reweighing of the remaining valid aggravating circumstances against the mitigating circumstances and the resulting affirmance of appellant's death sentences. However, I write separately to address the following.

Initially, I wish to reiterate my disagreement with the holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Rather, I endorse Chief Justice Burger's dissenting opinion wherein he opined that counsel should not be forced to explain peremptory challenges. *Id.* 476 U.S. at 117-126, 106 S.Ct. at 1734-39. *See Manuel v. State*, 751 P.2d 764, 765-6 (Okl.Cr.1988) (Parks, J.,

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[1] Notwithstanding, it continues to be the opinion of this writer that said circumstance is unconstitutionally vague both on its face and as applied. *See Foster v. State*, 779 P.2d 591, 594 (Okl.Cr.1989) (Parks, P.J., specially concurring). However, as a matter of *stare decisis*, I yield to the "torture or serious physical abuse" standard adopted in *Stouffer*.

specially concurring). However, as I am bound to apply the *Batson* rule, I concur with the majority's disposition of this issue.

Furthermore, for the reasons stated in my separate opinion in *Fox v. State*, 779 P.2d 562, 579 (Okl.Cr.1989), I continue to view the so-called "anti-sympathy" instruction in the second stage unnecessary and confusing to the jury where mitigating evidence has been introduced. And, while this writer is "not presently prepared to abandon my opinion regarding the validity of the 'continuing threat' circumstance, I agree with appellant that more definitive guidance is needed." *Boltz v. State*, 806 P.2d 1117, 1126 (Okl.Cr.1991) (Parks, P.J., specially concurring). As a matter of *stare decisis*, however, I must yield to the majority view regarding these issues.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CYRIL WAYNE ELLIS,	)	
Appellant,	)	
	)	**FOR**
v.	)	**PUBLICATION**
STATE OF OKLAHOMA,	)	**No. F-86-887**
	)	
Appellee.	)	

OPINION ON REHEARING

(Filed January 26, 1994)

JOHNSON, VICE PRESIDING JUDGE:

Appellant, Cyril Wayne Ellis, was convicted in the District Court of Oklahoma County, Case No. CRF-86-651, on three counts of Murder in the First Degree and four counts of Shooting With Intent to Kill. Punishment was set at death for each count of murder and 2,000 years, 3,000 years, 1,000 years and 1,000 years for the four counts of Shooting With Intent to Kill. We affirmed the convictions and sentences in *Ellis v. State*, ___ P.2d ___, 63 OBJ 2327 (Okl.Cr. July 24, 1992). Appellant has now filed a Petition for Rehearing pursuant to 22 O.S. 1991, Ch. 18 App., Rules of the Court of Criminal Appeals, Rule 3.14(B).

Appellant raises approximately ten allegations of error in his petition. Rule 3.14(B) specifically provides:

> A petition for rehearing shall not be filed, as a matter of course, but only for the following reasons:
>
> (1) That some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or

> (2) That the decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.

After fully considering the petition filed herein, we find that appellant's first, third, sixth and seventh allegations of error are the only issues raised that are appropriate for rehearing. Therefore, we will limit our review to these issues alone.

In his first proposition of error, appellant asserts that this Court improperly overlooked Proposition XXIII which alleges that the State improperly made false and misleading statements during closing arguments. On June 1, 1992, barely two months prior to the opinion in this case being handed down, appellant filed a Motion to Supplement Record and Brief. Therein, appellant requested that this Court permit him to file a Supplemental Brief which added Proposition XXIII to his brief-in-chief. For unknown reasons this motion was not brought to the Court's attention until after the opinion on direct appeal was handed down. While it is *very* doubtful that appellant's motion would have been granted at the time it was filed, considering the circumstances this Court now feels compelled to address Proposition XXIII on rehearing.

The allegedly improper comments occurred during closing arguments following the conclusion of evidence in the penalty phase. Specifically, appellant contends District Attorney Macy incorrectly stated that the appellant voluntarily committed himself to St. Anthony's Hospital and that no doctor recommended that he be committed. In addition, appellant submits that Assistant District Attorney Foley misrepresented facts when he said that appellant was not on any medication except occasional insomnia

medication. Appellant maintains these comments denied him a fair trial and reliable sentencing hearing.

We review for fundamental error only as defense counsel failed to object to either of these comments when they were made at trial. *Trim v. State*, 808 P.2d 697, 699-700 (Okl.Cr.1991). While these comments may not have been entirely accurate, the misstatements were not so egregious as to amount to fundamental error that would require reversal or modification of appellant's convictions and sentences. *Langley v. State*, 813 P.2d 526, 531 (Okl.Cr.1991). The jury had already rejected the appellant's insanity claim by finding him guilty in the first stage of trial. Furthermore, after reviewing the totality of the evidence, we fail to see how these minor misstatements of fact could have affected the outcome of the sentencing hearing. *See Mornes v. State*, 755 P.2d 91, 94 (Okl.Cr. 1988). Therefore, we find the comments did not deprive appellant of a fair trial.

In his third proposition of error, appellant claims the Court's opinion regarding the necessity for an admonishment is in conflict with prior decisions of this Court. On appeal, appellant submitted the trial court erred by not declaring a mistrial following an emotional outburst in the courtroom. We found no error holding that "[t]he incident was of short duration and the trial court took appropriate measures to prevent any unfair prejudice." The Court further noted that "no admonishment was requested at trial" and that no fundamental error occurred. Appellant now complains that the Court's language that no admonishment was requested is in conflict with *Kelsey v. State*, 744 P.2d 190, 192 (Okl.Cr.1987).

In *Kelsey*, this Court overruled prior cases to the extent that they required a request for an admonishment, in addition to a timely specific objection, in order to preserve the record for appellate review. Preserving error for appellate review and curing alleged trial court error are two very different matters. This Court did not find that appellant failed to properly preserve the record for appellate review. The Court's decision was based upon the finding that the trial court's actions sufficiently prevented any unfair prejudice. Consequently, further curative action was not necessary. As the Court's finding was not in conflict with prior decisions of this Court, this proposition of error is without merit.

In his sixth assignment of error, appellant maintains the Court's finding that no error occurred by the late endorsement of Michael Deloney is in conflict with controlling decisions to which this Court's attention was not called. Appellant specifically refers this Court to *Thomas v. State*, 811 P.2d 1337 (Okl.Cr.1991), *Williamson v. State*, 812 P.2d 384, 408 (Okl.Cr.1991) and *Hunter v. State*, 829 P.2d 64 (Okl.Cr.1992). We have thoroughly reviewed these cases and find they are not controlling on this issue. Appellant was clearly notified prior to trial of the evidence to be offered in aggravation, and defense counsel was given a sufficient opportunity to prepare. Therefore, relief is not required.

Finally, in his seventh assignment of error, appellant asserts this Court did not conduct a proper reweighing of the aggravating and mitigating factors as required by *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). As a result, appellant maintains he was improperly deprived of his right to an individualized sentencing determination.

When reweighing, this Court must review the aggravating and mitigating evidence to ascertain the role which the invalid "heinous, atrocious or cruel" aggravator played in the jury sentencing process. *Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130, 1136, 117 L.Ed.2d 367 (1992). The Court must then determine, through the reweighing process, what the jury in this case would have decided had it not considered the invalid aggravator. *Stringer*, 503 U.S. at ___, 112 S.Ct. at 1137; *Richmond v. Lewis*, 506 U.S. ___, 113 S.Ct. 528, 535. 121 L.Ed.2d 411 (1992). In the Court's original majority opinion, this Court provided a very thorough analysis of the evidence offered in support of each of the aggravating circumstances and found it to be sufficient. However, upon review, we find that a more thorough account of the mitigating evidence considered in the reweighing process is needed.

The arguably mitigating evidence presented during the proceedings basically consisted of the following:

1. Appellant's brother and sister love him and would visit and communicate with him in the penitentiary;

2. Friends and a former teacher of appellant's found him to be very special and were concerned for his future;

3. Appellant was a very active member of the Garden of Prayer Church of God and Christ and was the Assistant Sunday School Superintendent and a young Minister;

4. Appellant helped save Ms. Jennifer Champ from drowning when her car slid into Reno Creek;

5. Appellant was a volunteer at the Oklahoma County Juvenile Bureau and spent time talking with children;

6. Appellant has a history of mental illness;

7. Appellant had discussed his mental problems and desire to destroy himself with his church;

8. Just prior to the commission of the crimes, appellant attempted to commit suicide. After his suicide attempt, he was admitted into the psychiatric ward at St. Anthony's Hospital;

9. At the time of the murder, the appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness;

10. Appellant had no prior felony convictions;

11. Appellant showed remorse for the shootings when he was questioned by Detective Sellers.[1]

Furthermore, Instruction No. 17 specifically referred the jury to a minimum of eleven possible mitigating circumstances (O.R. 149). In addition to the list provided above, Instruction No. 17 included two additional possible mitigators for the jury to consider: the appellant's conduct during the course of the trial; and appellant's performance at Rose State College.

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[1] This Court notes that this is not necessarily an all encompassing list of the mitigating evidence presented at trial and considered by this Court when reweighing. Rather, the list merely highlights the majority of the evidence offered in mitigation.

Upon carefully considering and reviewing the evidence which supports the two valid aggravating circumstances, as was set forward in the Court's original opinion, as well as the evidence which may be considered mitigating, this Court finds the sentences of death were factually substantiated and appropriate. While we do not take lightly the mitigating evidence presented, it is clear that the jury's improper consideration of the unconstitutional aggravator did not play a significant role in its decision to sentence appellant to death as the evidence supporting the two valid aggravators was concrete and substantial. We therefore again find that appellant's death sentences should be **AFFIRMED**.

On the basis of the foregoing, this Court finds that appellant's request for relief should be, and the same is hereby DENIED. The Clerk of this Court is ordered to issue the mandate forthwith.

AN APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY, OKLAHOMA
THE HONORABLE RAYMOND NAIFEH,
DISTRICT JUDGE

Cyril Wayne Ellis, appellant, was convicted in the District Court of Oklahoma County, Case No. CRF-86-651, on three counts of Murder in the First Degree and four counts of Shooting With Intent to Kill. Punishment was set at death for each count of murder and 2,000 years, 3,000 years, 1,000 years and 1,000 years for the four counts of Shooting With Intent to Kill. We affirmed the convictions and sentences in *Ellis v. State*, ___ P.2d ___, 63 OBJ 2327 (Okl.Cr. July 24, 1992). On August 13, 1992, appellant filed a Petition for Rehearing pursuant to 22 O.S. 1991, Ch. 18 App., Rules of the Court of Criminal Appeals, Rule

3.14(B). After further reconsideration, we again **AFFIRM** the Judgments and Sentences, and appellant's request for relief is **DENIED**.

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611 COUNTY OFFICE BUILDING
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ATTORNEY FOR APPELLANT

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OPINION BY: JOHNSON, V.P.J.
LUMPKIN, P.J.: SPECIALLY CONCURS
LANE, J.: NOT PARTICIPATING
CHAPEL, J.: NOT PARTICIPATING
STRUBHAR, J: CONCURS.

LUMPKIN, PRESIDING JUDGE, SPECIALLY CONCURS:

I concur in the Court's opinion; however I write separately to emphasize two points.

First, the opinion reluctantly addresses Proposition XXIII, which was added in a supplemental brief filed on June 1, 1992, barely two months before this Court's opinion of his direct appeal was handed down. The record

does not show the request to file a supplemental opinion was ever granted. Therefore, it is not properly before this Court. In any event, a supplemental brief is "intended to be limited to supplementation of recent authority bearing on the issues raised in the brief in chief, or on issues specifically directed to be briefed as ordered by this Court." *Castro v. State*, 745 P.2d 394, 404 (Okl.Cr.1987), *cert. denied*, 485 U.S. 971 (1988) (quoting Rule 3.4(F), *Rules of the Court of Criminal Appeals*, 22 O.S. 1991, Ch. 18, App.). *See also* Rule 9.3(D) (supplemental brief "shall only supplement authorities cited in the previous briefs"). Consequently, the proposition is not properly before the Court, and this Court should not address it.

Second, while this Court has specifically listed the mitigating evidence presented by Appellant at trial, I write separately to list more specifically the evidence in aggravation against Appellant. This Court struck down the aggravating circumstance that the murders were heinous, atrocious or cruel; but let stand two remaining aggravating circumstances: Appellant knowingly created a great risk of death to more than one person; and the existence of a probability Appellant could commit criminal acts of violence that could constitute a continuing threat to society.

Appellant left a blood bath in his wake, killing one victim at one location while killing two more at another location. At the first location, he killed Teresa Thomas; then shot Tameca Thomas, critically injuring her. Before that, he forced one man, Robert Dumas, into the trunk of a car; he then later opened the trunk, said "I see you don't want to live," and shot Dumas twice because Dumas was attempting to call for help. At the second scene, where Appellant worked, he shot and killed Carl Lake and James

Rider. He also encountered Gordon Moore, whom he shot in the face after ordering Moore to kneel down on the ground. As Appellant left, he fired at a group of men who ran out into the parking lot; stopped to reload; then fired again before driving away. During that exchange he shot Ancil Davis. This evidence strongly supports the jury's finding Appellant knowingly created a great risk of death to more than one person.

In addition to the above evidence, Appellant's own statement to police and other evidence shows he first shot Teresa Thomas inside the house and continued to shoot her as she crawled outside, begging for her life. Evidence also showed Appellant acted calmly and coolly during each murder, and did not kill every one he intended to kill. After he left his place of employment, he called back and asked them how they enjoyed "that trick or treat I just gave you." Appellant had previously threatened to "take some metal to some heads"; had struck fellow employees without any apparent provocation; and had physically assaulted his fiancee and a former girlfriend when problems arose in those relationships. This amply supports the jury's finding Appellant would probably commit future acts of violence making him a continuing threat to society.

All this evidence, when taken together, more than outweighs the mitigating circumstances the jury considered.

Accordingly, I concur.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CYRIL WAYNE ELLIS,

Petitioner-Appellant,

v.

MIKE MULLIN, Warden,
Oklahoma State Penitentiary,

Respondent-Appellee.

ORDER

Filed March 4, 2003

Before **EBEL**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **MURPHY**, Circuit Judge.

Appellee's petition for rehearing is denied.[1]

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. A poll was requested and a majority of the active judges voted to deny rehearing en banc.[2]

The panel opinion, filed December 10, 2002, is hereby modified in the following regards:

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[1] Judge Brorby voted to grant rehearing.

[2] Judges Kelly, Briscoe and O'Brien voted to grant rehearing en banc. Judge Henry is recused in this matter.

On page 10, the last sentence of [sic] first paragraph has been deleted ("However, the state court's determination . . . State court proceeding"). Inserted in its place, *Le v. Mullin*, 311 F.3d 1002, 1010 (10th Cir. 2002).

On page 11, the first sentence of [sic] first paragraph has been deleted ("We conclude that the OCCA . . . at the time of the incident."). The word "Ellis" is inserted in the first sentence following this deleted text. The words "The" and "report" have been added in the eighth line from the bottom of page 11.

A minor change in the dissent has also been made by Judge Brorby.

A copy of the modified opinion has been attached to this order. All recipients of the opinion are directed to discard any previous copies.

Entered for the Court
PATRICK FISHER, Clerk of Court
by: /s/ Ardell Schuler
Deputy Clerk

ESH FORM 1125.47-1A

EASTERN STATE HOSPITAL
Vinita, Oklahoma

DISCHARGE SUMMARY

Name	Register Number	Ward	Type of Commitment
ELLIS, Cyril Wayne	#40560	12-1	O&E
Type of Admission	**Admission Date**	**Release Date**	**Type of Release**
First Admission	3-5-86	4-2-86	Discharge

IDENTIFICATION: This was the case of a 25 year old, single, black male, born in Mississippi on 2-7-61, occupation dock checker, Pentecostal religion, two years of college education, having been here in Oklahoma for 3 1/2 years with the chief complaint of, "I was sent here to see if I was mentally competent at the time of the shooting". He shot and killed three people and injured several others, at least four. On admission he was seen and examined and by Dr. Lizarraga.

ADMITTING DIAGNOSIS:

Axis I: Schizophreniform disorder vs. Dissociative personality disorder.

Axis II: No diagnosis.

Axis III: No diagnosis.

Axis IV: Catastrophic.

Axis V: Fair.

GAS: 50.

FINAL DIAGNOSIS

Axis I: Schizophrenia, paranoid type, chronic in complete remission spontaneously without any medication.

Axis II: No diagnosis.

Axis III: No diagnosis.

Axis IV: Catastrophic.

Axis V: Poor.

GAS: 70.

CONCLUSIONS AND RECOMMENDATIONS TO COURT ORDER QUESTIONS:

1. Yes, he is a person able to appreciate the nature of the charges against him.

2. Yes, he is a person able to consult with his lawyer and rationally assist in the preparation of his defense.

3. Not applicable.

4. No, he is not a mentally ill person or a person requiring treatment as defined by Oklahoma Statute Title 43A, Section 3. His illness in now in remission at the present time.

5. No, this is a person if released without treatment, therapy, or training in my estimation, he possibly would not pose a significant threat to the life and/or safety of himself or others.

He is not on any medication at all except occasional insomnia medication if needed prn. He had a severe dissociative disorder in the past with psychogenic headaches and may have been completely depersonalized at the time of the incident. At least he claimed repeatedly,

emphatically, without changing his viewpoint and report that he completely blocked out and did not remember the detail of the shooting. He knew he bought the gun in order to kill himself. He was seen by psychiatrists prior to the date of the shooting, 1) Dr. Krugar, Oklahoma City in 1982, January 1986 by Dr. Robert Lonian, referred him to Dr. Murali Kirshna. He tried suicide attempts by overdosing with Tylenol, Probenecid, and three bottles of other medication on January 26, 1986. On January 13, 1986 he cut his left antecubital area of the right arm after shootings. In the past he had EEG, CT brain scan the 22nd day of January of 1986 in the Presbyterian Hospital in Oklahoma City. He had psychiatric treatment by two psychiatrists in Oklahoma City in 1982 and 1986. He had history of previous left foot injury in the War as a related incident while the patient was trying to collect compensation and described the initiating factor for the two surgical procedures, which to him were not successful.

BRIEF HISTORY & ESSENTIAL PHYSICAL FINDINGS: Complete physical examination revealed height 71½" (5'11½"); weighing 208 pounds; pulse 70 per minute; respiration 18 per minute; temperature 99.0; blood pressure 140/88. Well developed and well nourished. Wearing eyeglasses for nearsightedness, left exotropia. Partially occluded with cerumen of the ear canals. System review within normal limits. Neurologically negative. Post surgical scar on the left foot in the ventral area, two places. He gave a history of hypertension and will be checked on this.

On admission he knew that he came here for further evaluation with second or third opinion around January 26, 1986, and then went AWOL while being hospitalized for one day when he was afraid because at that time he heard voices. So, he borrowed a gun on January 29, 1986

to kill himself and then he emphatically denied that he did not remember the shootings, why he did it, and so forth. He had been hospitalized at St. Anthony's Hospital in Oklahoma City January 29, 1986, but went AWOL the same day. He has been treated by Dr. Krugar in 1982, who is no longer there. He had something for his nerves while in the hospital. He took Haldol, 10 mg., b.i.d., and Benadryl, 25 mg., b.i.d., while in jail 1-13-86 up until he was admitted here. With regard to his occupation, he lived alone to work with a freight company as a dock checker. He has been off of work for most of the past year due to the foot injury (ran over by a forklift in June of 1984) and has had two orthopedic surgeries on the foot.

His thought content on the mental status revealed he was hearing voices, felt that no one cares about him, he might as well do away with himself, and he cannot trust people anymore. He was suspicious and paranoid. He felt his body was frozen by the demons and spirits trying to take over his body and his spirit. He began feeling that even the doctors were against him and he began talking and thinking about it since December of 1985. He states he had some so-called blackout and cannot remember what he had done. There was a comprehensive report and autobiography by verbal interview. Complete laboratory examination and x-rays were completed. Historically back in 4-29, 5-10-67 he was in the neurosurgical ward suffering from cerebral concussion. He was then confined at the City of Memphis hospital – John Guston Hospital – dating 4-29-67 to 5-10-67, treated by Dr. Perry. At that time he had a grossly abnormal EEG and is compatible with a recent severe head injury; there were no focal features; suggest repeat tracing in one week; reported on 5-1-67. The incident was that he was struck by a car while crossing a

street; knocked down, ran over by another automobile traveling in the opposite direction and was dragged about 5-6 feet. He had abrasions about his head and trunk. He was rendered unconscious when struck and remained so for several days. He developed chicken pox while he was in the hospital and was in isolation. He finally regained consciousness. There was also a question of internal bleeding, aside from the head injury; he had a skull fracture associated with a contusion of the brain tissue. He recovered satisfactorily from the injury when discharged from the hospital.

Glucose 103, normal. Master chemistry within normal limits. Complete blood count within normal limits except slight deviation. Thyroid profile within normal limits for T-3, T-4, and T-7. Urinalysis negative. No evidence of recent or active chest pathology on x-ray. Left foot x-ray, healing fracture of the distal shaft of the left tip metatarsal in good position with associated soft tissue swelling. Bunion deformity, left great toe noted. Skull x-ray, very thick skull bone; otherwise, negative skull. EEG, normal for wake and sleep and for hyperventilation for his age. Neurological evaluation by Dr. Harold E. Goldman revealed his impression, "I find no signs of organic central nervous system disease at this time. I feel that his attacks of blackouts are probably related to stress phenomena. I find no signs of temporal lobe epilepsy or other organic brain syndrome at this time." There was nothing mentioned about migraine headaches.

COURSE IN HOSPITAL: He was admitted to 12-1, regular diet, Haldol, prn, first 10 mg. tablet, p.o., b.i.d.; and Benadryl capsule, 25 mg. p.o., b.i.d.; Tylenol, two tablets, every four hours, prn. Later on, all these were discontinued and psychological testing was ordered to rule out organicity vs. schizophrenia. He was seen by the forensic

team on numerous different occasions. In the beginning he was on minimal suicide precautions, which later on was discontinued. For insomnia, Noctec or Chloral Hydrate were prescribed. Double portion diet was prescribed on 8-18-86. Chloral Hydrate continued off and on. Maalox, 30 cc., for gastric upset was prescribed off and on and prn. He was able to verbalize a lot of things but still pleaded amnesia to the date of the incident. Accucheck for blood sugar was made, which was reportedly negative. Random blood sugar was also done, and in normal limits. On 3-25 double portion diet was discontinued and placed on regular diet. To be staffed again on the same date. Benadryl was discontinued. It was decided to continue the minimal suicide precaution. Socializing very well with other patients. He wrote an autobiography and other reports from various treatment modalities were received. Finally he was discharged on 8-2-86 when I was about to treat his left ear which was clogged with cerumen with Debrox. No amnesic spell. No blackout spell. No violent rage, panic. No signs of temporal lobe epileptic equivalence. Not much migraine headache noted. Much, much improved spontaneously. Psychological testing completed. Attended recreational activities, liked to play Ping-Pong. Only suicidal thoughts when he left. Competent in the psychological, legal, and sociological point of view at this time. He may have had history of schizophrenic or schizophreniform behavior in the past, in complete remission at the present time. He is definitely competent to stand trial at the present time, knowing right from wrong and capable of testifying in his defense.

/s/ R. D. Garcia, MD
R. D. Garcia, M.D.
Chief Forensic Psychiatrist

RDG:sc

Opposition Brief Unavailable for Filming at This Time